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THE ELEMENTARY PRINCIPLES
OF JURISPRUDENCE



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THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE

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PREFACE

HE who treads in the footsteps of Austin, Maine, Holland, and Salmond, no matter how distantly, should do so with circumspection; and the present volume has been prepared for publication only after considerable reflection. In 1924, I compiled a course of lectures on Jurisprudence for a class of Final students in Hong-Kong University. The class was composed largely of Chinese, the remainder being Hindoos and Japanese. During the course, I held informal discussions with most of the students, as a result of which it emerged that some of the legal conceptions which are accepted without question in the West are sources of considerable difficulty to the Eastern student. The conception of Law existing for the promotion of private rights is alien to him. Duty seems relatively a more important conception than right, whilst Law as the creature of the State was a constant stumbling-block to students whose contact with it had hitherto been limited to a knowledge of ancient custom. On the other hand, on the topic of Natural Law and that of the essentiality of Sovereignty, I found that the students were familiar with very similar doctrines in Chinese classics, and that they could appreciably supplement my materials. Throughout the course, however, I felt that their lack of familiarity with the background of European civilisation made it necessary for me to explain the relation of the State to the Law with more fulness than would otherwise have been the case. Finally, the scientific analysis of English, Roman, and International Law, which Holland has achieved with such classic brevity, I was compelled to abandon altogether in favour of a simpler explanation of general legal principles; whilst, since their studies were hampered by the language difficulty, I found it necessary to indicate how wide the field of Jurisprudence was, without at the same time overloading my lectures with too much detail.

In lecturing on Jurisprudence to English students, I have found that whilst some of the elementary explanations essential for Oriental students are no longer necessary, some of the difficulties of the foreign student are also the difficulties of our own. Moreover, the ordinary English student does not easily perceive that the labours of Austin and Maine are comple-

mentary, and lead to the same goal. At first sight they look to him like two different sciences. I accordingly re-wrote my lectures, with the object of showing how wide the field of Jurisprudence really is, and that whilst there are many avenues to Legal Truth, the fundamental principles are nevertheless constant. In this composition, I retained only those materials drawn from non-European sources of law which seemed to me to make some point clearer than it otherwise would have been. The tripartite arrangement I adopted, since it seems to me to emphasise the threefold function of Jurisprudence. The extent to which I am indebted to Austin, Holland, and Salmond will, I hope, be clear from the footnotes. They were the starting-points of my studies, and their influence is naturally considerable; and where I have differed, I have attempted to insinuate my own view with due deference. I have also remembered with gratitude the particularly clear lectures which Mr. A. L. Goodhart delivered whilst I was at Cambridge; although this must not be taken to involve him in any responsibility for any of my views.

I would also like to express my gratitude to my friend and colleague, Professor R. A. Eastwood, LL.D., who undertook the task of reading the volume, not only before I submitted it for publication, but also in proof. I have profited considerably by his criticisms.

G. W. KEETON.

THE VICTORIA UNIVERSITY, MANCHESTER,
December 1929.

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THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE

PART I THE STATE AND THE LAW

I.—THE SCIENCE OF JURISPRUDENCE

THE subject-matter of Jurisprudence is the relations of Man to Society and to his fellow-men, in so far as those relations are regulated by Law. It will thus immediately be apparent that Jurisprudence is a social science, closely allied to Political Science, Economics, and Ethics. The study of Jurisprudence presupposes a knowledge of law, or of some particular branch of it, but the amount of law which must necessarily be known before the subject may be undertaken profitably by the student varies to some extent, according to the method which the student proposes to employ. That is to say, there is more than one approach to the science of Jurisprudence.

Originally, Jurisprudence meant merely a knowledge of law. Thus Ulpian, in a celebrated passage, which Justinian placed at the beginning both of the *Digest* and of the *Institutes*, says: "Jurisprudentia est divinarum atque humanarum rerum notitia, justa atque injusti scientia." It is to be noticed that this definition contains two parts, the first stating that Jurisprudence is merely a knowledge of human and divine things, and the second stating that it is the science which distinguishes the just from the unjust. The second part, which recognises an abstract principle, while the first does not, is only historically connected with the first. It does not inevitably proceed from it. In Roman law, the jurists first stated what the law was. Later in their history they deduced from their knowledge the principles upon which their law was founded. Such is the development which has taken place in the science of Jurisprudence. In other words, the science of Jurisprudence may now be considered to be the study and systematic

arrangement of the general principles of law. Thus, Jurisprudence considers the elements necessary for the formation of a valid contract, but it does not attempt to enter into a full exposition of the detailed rules of the Law of Contract, either in English law or any other system. It analyses the notion of status, and considers the more important examples; but it does not consider exhaustively the points in which persons of abnormal status differ from ordinary persons. Again, Jurisprudence deals with the distinction between Public and Private Law, and considers the content of the principal departments of the law. To do more than this would be to attempt a treatise upon the substantive law of some particular state.

At the present day, there exist certain text-books which purport to discuss "Medical Jurisprudence" and "Dental Jurisprudence" and similar topics. They are compilations of facts, useful to the professions concerned, and as such fulfil an exceedingly useful function. But on account of the inclusion of the word "jurisprudence" in their titles, these works have incurred the censure and abuse of several writers upon the science of jurisprudence, properly so-called. The employment of what Professor Holland calls "the imposing quadri-syllable" for these works is greatly to be regretted, but probably arose from the fact that lawyers frequently find these works useful in dealing with cases involving medical and dental questions. On the other hand, the employment of the word "jurisprudence" when considering compilations of the laws of some country, or of some particular court (*e.g.* the Court of Chancery), is not intrinsically wrong; it has merely become so historically. The early Roman lawyers would have considered such compilations to be truly Jurisprudence; the later Roman lawyers would not, nor do we at the present time. The writers who entitle such compilations "jurisprudence" have thus not perceived the change which has taken place in the science. From this it follows that if the writers upon "Medical Jurisprudence" confined their labours to setting forth the law which relates to the medical profession, the use of the word would be less reprehensible, though it would still be inaccurate.

Although it cannot be too strongly emphasised that there is only one science of Jurisprudence, there are many methods of approach to it, and it is customary in studying the science to employ one method principally, although occasionally recourse may be had to others. Some of these methods of approach may be collected together in groups, since they possess some common factor. Thus, three very important methods—the Historical, Analytical, and Critical (adjectives which are used shortly, though inaccurately, to qualify the name of the science itself)—are united by

the time factor. Each method of approach contemplates the subject-matter—Law—from a different standpoint in time, consequently reaching different, but mutually supplementary, conclusions.

Historical Jurisprudence examines the manner of growth of a legal system. It should be carefully distinguished from Legal History, which records simply the changes which have occurred in the development of law. It is the function of Legal History to set forth the development of law, allotting to each phase its true position in the completed narrative. Legal History, however, is not critical, except unconsciously. It indicates the processes of change, and is therefore descriptive. It is the function of Historical Jurisprudence to interpret those changes, and to expose the forces which have brought them about. The science supplies a running commentary upon the development of a people, as reflected in its institutions. Taking a broad view of the whole system, it explains the inner significance of each change in the structure of the system. As Sir Frederick Pollock puts it, "the historical method is nothing else than the doctrine of evolution applied to human societies and institutions."¹

The conscious application of the historical method to the study of legal principles is modern, although signs of it are perceptible in some Renaissance writers. Savigny (1779-1861) is usually regarded as the founder of the science of Historical Jurisprudence in Modern Europe, although the historical method may be distinctly traced in the works of Savigny's slightly older contemporaries, Schelling (1775-1854) and Hugo (1768-1844), both of whom finally rejected the "natural" theory of law² in favour of an historical treatment of the subject. Savigny was also the first to raise the German school of civilians to international repute. Born at Frankfort, he studied at the University of Marburg, and held the chair of Civil Law in that University from 1801 to 1804. His great work on Possession (*Das Recht des Besitzes*) appeared in 1803, and with it the historical school of Jurisprudence may be said to be definitely inaugurated. The value of the work of Savigny lies, partly in its tremendous erudition, and partly in the fact that before him, the study of the Pandects in Germany was neglected for that of German Private Law, while after him, the future of the Civil Law in Germany was assured. Savigny demonstrated the continuity of the Roman tradition. Besides the work on Possession, his other great treatises were *System des Heutiges Romischen Rechts* (1840-1848), and *Geschichte des Romischen Rechts*

¹ *Oxford Lectures*, p. 41.

² By the "natural" theory of law is meant the deduction of legal rules from certain *a priori* principles of right and wrong. Natural law is considered in a later chapter.

im Mittelalter (1826-1831)¹—works whose titles speak for themselves. Among the greatest of Savigny's school are Puchta (1798-1846), whose position differs slightly from that of Savigny, however, for he regards law as an expression of popular activity, rather than of the national spirit; and Niebuhr, whose work was crowned in 1816 by the discovery of a palimpsest, in the library of the Cathedral Chapter at Verona, containing as its basic treatise the greater part of the *Institutes* of Gaius.

In England, Historical Jurisprudence will always be inseparably connected with the name of Sir Henry Maine. The conception of law as an organic growth, even though it did not originate with him, was at any rate first scientifically examined and put forward as an intelligible hypothesis to the English-speaking peoples by him, in the course of his investigations into the legal habits of early and non-European peoples, and though some of his conclusions must necessarily be modified as modern research steadily increases the volume of our knowledge, not only of primitive societies, but also of such highly civilised communities as the Ancient Egyptians, the Hindus, and the Chinese, the fundamental principles underlying his work are still as true as they were when first put forward, and no student of Jurisprudence can afford to neglect them.

Analytical Jurisprudence (which Sir John Salmond terms "Systematic Jurisprudence") takes a legal system as it actually exists, and resolves it into its fundamental conceptions. This was the method of the later Roman jurists; it was also the method of John Austin, who may be said to have founded the modern English school of Analytical Jurisprudence, although controversy has waged unceasingly around many of his fundamental propositions. The great merit of this method of approach to the subject is that it tends to produce a strictly logical science, rich in accurate definitions. The services of Austin to Jurisprudence are only adequately realised when the vast quantity of loose thinking and fanciful definition in law, preceding the publication of his lectures, is recalled.

Critical (or Deontological) Jurisprudence estimates the value of existing legal institutions and from them deduces what changes in the law are desirable. It has been urged that such considerations are not properly within the sphere of Jurisprudence at all, but are a portion of the allied Science of Legislation. Professor Gray² would limit the critical functions of the science of Jurisprudence to cases in which the law upon a particular topic is not

¹ *System of Modern Roman Law and History of Roman Law in the Middle Ages.*

² *Nature and Sources of the Law*, Sect. 306.

yet settled, but adds later that it might be extended to include a case in which there was a possibility that an already-existing rule of law might be extended to analogous groups of facts. But the whole question seems to be entirely one of terminology. In the first place, it might be objected that what Professor Gray terms "Critical Jurisprudence" is rather Hypothetical or Speculative Jurisprudence; but even this term is a misnomer, for there can be no Jurisprudence where there is no law, and Professor Gray has already admitted that the law on the topic did not exist. It is therefore difficult to see upon what principle the cases which Professor Gray enumerates can be differentiated from a general discussion of what the law ought to be. They are all either within the science of Critical Jurisprudence or within the Science of Legislation. In any case, the science which discusses what law ought to be can only be adequately begun when the student possesses a knowledge, not only of what law is, but of what it *has been*. In other words, the science of Critical Jurisprudence or of Legislation depends naturally upon the sciences of Analytical and Historical Jurisprudence, and is impossible without them. It is an undoubted fact that such a science performs an exceedingly useful function, intimately connected with the progress of law. Glimpses of it, indeed, may frequently be discovered in practically every work dealing with Jurisprudence. Moreover, without conclusions relating to legal progress, Jurisprudence would be a somewhat barren science, and both the historical and the comparative methods of approach would lose much of their value. Inevitably, therefore, there could exist no philosophy of law in the true sense of the word. To quote Dr. Jethro Brown: "Whether justice be regarded as something divinely revealed to man; or as something absolute, immutable, superior to contingencies of fact, and determinable by some *a priori* process of reasoning; or again, as something whose meaning and nature are being revealed in the long course of social evolution and so to be determined by the analysis of human experience—in either of these cases we are confronted by the fact of an ideal of justice to which it is held to be the mission of law to conform. 'Justice is,' said Carlyle, 'whether I can define it or not.'"¹ A little later, the same author quotes a statement of Chief Justice Holmes: "I look forward to the time when the part played by history in the explanation of dogma shall be very small, and when, instead of ingenious research, we shall spend our energy on a study of the ends sought to be obtained, and the reason for desiring them." When definition has done its utmost, therefore, Critical Jurisprudence, or the Science of Legislation, will still preserve its

¹ *The Austinian Theory of Law*, p. 372.

intimate connection with the science of Jurisprudence in general. It may possibly be urged that it has never been intended to divorce the two sciences completely. This may be true, but the fact nevertheless remains that writers upon Jurisprudence have sought to relegate Critical Jurisprudence to a position inadequate to its importance. To sum up, there seems little objection to the inclusion of Critical Jurisprudence within the sphere of Jurisprudence proper, provided that the inquiry is conducted with due regard to the existing system, and the manner of its growth, and that the suggestions resulting from the inquiry are precise and practical.

Two further methods of approach—known shortly as Civil or Municipal, and International Jurisprudence—may be differentiated according to the communities over which the legal system extends. Generally speaking, only law which is administered within a definite political community or state is considered in Jurisprudence, and when this is examined, the term Civil or Municipal Jurisprudence is applied to it. The adjective Civil bears several meanings, however, thus occasioning some confusion, and Municipal thus seems the better term. International Jurisprudence is concerned with the principles upon which the law existing between states is based, and since that law is of recent growth, the science itself is relatively modern.

A third classification of methods of approach possesses as its differentiating characteristic the number of legal systems examined. Thus we have Particular, Comparative, and General Jurisprudence.

Particular Jurisprudence is the science which examines any actual and single system of law. The benefits of this method of approach to the science are obvious. Frequently, the student's knowledge of law is confined to that of some single system, by the application of which he eventually hopes to earn his living. Accordingly, Particular Jurisprudence will deal with legal relations with which he is already familiar. Further, it will assist him to appreciate the principles upon which his national system is based, for without such an understanding, law is simply a collection of arbitrary and unconnected rules.

Comparative Jurisprudence considers the development of two or more systems of law. The term has more than one meaning, however. The science may have for its object the discovery of those legal rules which are common to the legal systems studied; or again, it may discuss those relations of individuals which have legal consequences, together with an inquiry how those relations find expression in the legal systems considered. More frequently, Comparative Jurisprudence selects various legal topics, and explains

fully their method of treatment in two or more systems of law.

Comparative Jurisprudence has only recently received its recognition as a science. The Roman lawyer, habituated to the classic symmetry of his own system, despised the confusion and archaisms of English law ; while the common lawyer, rich in the accumulated wisdom of Bracton, Coke, and the Law Reports, could scarcely conceive that any other system might furnish illustrations which it would be profitable for him to study. Nevertheless, even for practical purposes, the science of Comparative Jurisprudence might prove to be of extreme value. What person could form an adequate conception of the value of codification from the study of English law alone ? And who could discover the full nature of a corporation from the study of classical Roman law ? The commentator on the Pandects, noticing change since the age of Justinian, unconsciously admitted comparison, usually with the Canon Law. For the student, as distinct from the practising barrister, more abstract questions suggest themselves. Why is it intrinsically right that precedents should be binding in English law, and not in Roman law ? Will not the solution of this question do something towards elucidating the nature of the conception of law itself ? Will not a consideration of the manner in which various peoples treated certain circumstances, *e.g.* the fact of possession, assist in explaining the legal temperament of those peoples ?

Last in this group of methods of approach to Jurisprudence is General Jurisprudence. Unfortunately, the term has more than one meaning. In its obvious significance, it contemplates a comparison of all the legal systems of the world. Leibnitz proposed a work of this type when he declared that if he lived long enough, he would set forth the legal systems of all nations in parallel columns. In Leibnitz's day, this would not have been the practical impossibility which it is now, for the only legal systems which he could have profitably and accurately compared would have been the Roman, with its off-shoot, the Pandect-law of Germany ; the English ; and possibly the Mohammedan. To-day, in order that such a science could be constructed, a consideration of Hindu, Turkish, Chinese, Japanese, as well as of Roman and English law and other systems would be necessary, together with some notice of the laws and customs of numerous uncivilised and semi-civilised peoples, at all stages of social development. Such a study would be far too big to be of any practical value. Besides, it is exceedingly doubtful whether it would serve any practical end. True, Professor Holland has observed that "Jurisprudence is a pro-

gressive science. Its generalisations must keep pace with the movements of systems of actual law,"¹ thereby indicating that such generalisations are possible. Professor Buckland, however, supplies a necessary note of caution, when he writes: "What is likely to be the fate of a principle found in the law of, say, ten states which go on developing on different lines? The probabilities are against its continuance as a general principle. And the notion that some other general principle will arise to take its place appears to be rather an article of faith than a proposition on which a science can be based."² Professor Buckland then proceeds to demonstrate that the generalisations which Professor Holland wishes to make about the systems of law themselves may be made about the principles according to which the institutions and juristic notions of various communities themselves change. In this particular, the science of Jurisprudence approaches very close to the sciences of Anthropology and Sociology, but all three gain by this proximity. The point which Professor Buckland made when replying to Professor Holland is also implied in Sir Frederick Pollock's note to the first chapter of Maine's *Ancient Law*, in considering the order of growth of a community's institutions. From a consideration of the various influences affecting this growth of human institutions, it would appear that no two systems of law ever develop along precisely similar lines, although the principles governing the order of change are both clear and constant.

The term "General Jurisprudence" may be used with a second and quite different meaning to denote the study of those legal rules which are found in all systems of law. Just as the science of General Jurisprudence, when considered as the science which compares the legal systems of the whole world, is too vast, so the science of General Jurisprudence, when bearing its second meaning, is altogether too small to be of any value. Professor Gray notes: "The list of rules of Law received *semper, ubique et ab omnibus* from Kamschatka to Patagonia is likely to be a short one."³ This is a conservative estimate. In all probability, the list would not contain a single rule; that is to say, the science of General Jurisprudence, in this sense, has no practical existence. In any case, it is doubtful whether the list, when made, would do more than indicate that some particular group of rules had been borrowed universally from some well-established system on account of their extreme utility.

¹ *Jurisprudence*, 13th edn. p. 9.

² "The Difficulties of Abstract Jurisprudence," *Law Quarterly Review*, xiv. p. 444.

³ *Nature and Sources of the Law*, Sect. 295.

There is also a third, and more usual, meaning attached to the term "General Jurisprudence," *i.e.* a statement of the most important general legal principles and institutions as they occur in civilised communities. Understood in this sense, General Jurisprudence already possesses a considerable literature, of which Berolzheimer's *The World's Legal Philosophies* may be taken as a good example. Sir Paul Vinogradoff has summed up the work of this school of jurists as follows :

"But suppose that, after drawing up your table of contents, you proceed to define law and right or property or crime? You will not only find that many of your colleagues disagree with you—this is inevitable in any case, but it will be difficult to deny that the ideas of the Greeks about justice as the end of law, or the Roman conception of absolute property (*dominium*), or the view of the Canonists as to crime and sin, do not coincide with the teaching of modern jurists, and are not likely to coincide with the doctrines of their probable successors.

"There is bound to be more substantial agreement as regards *methods* of legal thought in so far as these rest on an application of *logic*, because formal logic is built upon universally accepted rules as to the operations of reasoning. But in this department also, all the technical elements supplied by positive law as regards rules of presumption, of proof, of relevancy, of pleading, etc., will be 'municipal,' or relative and not universal, or absolute. To sum up, the General Jurisprudence of the nineteenth century can hardly stand for anything else than an encyclopædic survey of the juridical principles of individualistic society. In this sense it deserves full attention, because it expresses the tendency of the legal mind to co-ordinate and to harmonise its concepts into a coherent and reasonable whole on a given basis—the basis of individualism."¹

Another mode of division of the methods of approach to the subject is from the standpoint of the branch of law examined. Thus, we may have National Jurisprudence, in which all the law of a given community is subjected to scientific investigation; or Civil or Criminal Jurisprudence. Sir John Salmond's text-book thus deals chiefly with the civil law of England.

It is further apparent that these divisions of the science are not mutually exclusive. Thus we may have Comparative Criminal Jurisprudence, and innumerable other combinations—so that the methods of approach to the science of Jurisprudence are exceedingly numerous. There are also several other methods of approach, which do not admit of any regular classification, the more important of which must be briefly mentioned.

The content of Natural Jurisprudence is largely ethical. It

¹ *Historical Jurisprudence*, i. p. 55.

deals with the Law of Nature—the *jus naturale* of the Romans. The chief concern of Natural Jurisprudence is an abstract conception of right or justice. Ulpian defines this as “constans et perpetua voluntas jus suum cuique tribuendi,” and both the classical jurists and the mediæval schoolmen held that the principles of natural justice, although possibly of extra-human origin,¹ were nevertheless deducible from the dictates of human reason. A necessary consequence of this argument was that the existing legal systems of the world were imperfect attempts to attain the ideal system of law, or Law of Nature. A further consequence was that where human law and the Law of Nature conflicted, the latter ought rightly to prevail. The great benefit which the idea of the Law of Nature has conferred upon the science of law in general has been its lofty conception of the purpose of law.

Ethnological Jurisprudence traces the evolution of legal institutions in response to a supposed racial stimulus, as modified by environment. It supplies for Historical Jurisprudence the same function which is supplied to History by Anthropology. Its literature is not extensive, and is remarkable chiefly for including one of the lesser-known of Jhering's works—a brilliant study, *The Evolution of the Aryan*.

Economic Jurisprudence begins with the assumption (now discarded) that man functions exclusively in response to economic forces, and then traces the manner in which this economic activity has reacted upon the development of law. Man, however, responds to many forces, other than the purely economic, and to regard these alone as productive of legal relations, is to write a volume of Jurisprudence in the light of a particular theory. Acceptance of this fact has led to the replacement of Economic by Sociological Jurisprudence, which is in turn very closely connected with Historical Jurisprudence. The object of Sociological Jurisprudence is to explain the manner in which the social—*i.e.* the economic, moral, religious, and other—needs of a people influence the development of a nation's legal system. It differs from Historical Jurisprudence principally in the fact that it pays more direct attention to social forces within the community, and also in that it need not necessarily follow historical sequence. Moreover, it may select one or more prominent social forces, and discuss the influence of these upon a legal system during a given period. Thus a volume describing and explaining the legislative consequences of the rise of Trades Unionism—either in England or in Europe—in the nineteenth century, would be a

¹ This seems to be responsible for Ulpian's remarkable assertion—an assertion not supported by any other jurist—“*Jus naturale est, quod natura omnia animalia docuit.*”

volume dealing with Sociological Jurisprudence. An admirable example of the work of this school of thought may be found in Professor Roscoe Pound's two volumes—*Interpretations of Legal History* and *An Introduction to the Philosophy of Law*.

Lastly, there is Psychological Jurisprudence. This science takes as its starting-point the analysis of the human mind, so far as it is relevant to the formation of legal relations. It is clear that such a method of approach might be profitably adopted in investigating the whole field of law. For example, a psychological analysis of the nature of a contract would be of distinct utility,¹ but hitherto writers adopting this method have confined their attention almost exclusively to the criminal law, devoting their attention to an examination of the nature of crime, criminality, and criminal intention. The mind of the prisoner has been subjected to a most exhaustive scrutiny, and the accepted views of insanity, insane impulse, and incorrigibility have been abandoned. In most countries, the law of crime rests upon a somewhat unsatisfactory basis, chiefly because the principles to be applied have not been modified to fit the discoveries of modern science. Thus, English law contained no authoritative exposition of insanity in relation to criminal liability until *R. v. M'Naughten*² in 1843, and the rules there enunciated would seem to require some modification to-day. The question is, what degree of modification is compatible with the continued security of society against the depredations of the criminal? Several schools of modern criminologists have attempted to answer this question. In Germany, von Liszt, Prins, and van Hamel were chiefly responsible for the "International Union of Criminal Law," the attitude of which towards modern problems raised by crime and criminals is explained in a series of propositions laid down in the second article of the Union's constitution. The first proposition declares that "the purpose of punishment is to make war upon crime as a social phenomenon." An important point to notice with respect to this school of writers is that since they employ psychology merely as an approach to a Jurisprudence which is pre-eminently sociological, punishment is still a necessity for the security of society. There exists, however, a more radical school of criminologists (mostly Italian), founded by the physician Lombroso (whose most famous work is *L'uomo delinquente*), who, starting from the position described by Sir Robert Anderson when he declared that "our whole system of punishing crime is false in principle and mischievous in practice," and influenced considerably by the medical bias of their founder, regard punishment

¹ See, on this point, Holland, *Jurisprudence*, pp. 261-8.

² 10 Clark & Fin. 200.

as completely ineffective as a deterrent from crime. They regard crime largely as a disease of the mind, meriting treatment instead of punishment, and they tend to treat nearly every offender as an irresponsible being, the victim of either his nature or his nurture, either his defective cerebral organisation or his unfavourable social surroundings.¹ As a result of this, all general principles of punishment for crime disappear, and are replaced by medico-legal treatment of the individual directed towards the eradication of criminal instincts and impulses if this is possible, and if it is not, the removal of the patient from society and his employment upon work which will render the maximum benefit to the community.²

That the modern system of punishment has proved a failure and that some closer investigation into the mind of the prisoner and the circumstances of the crime than is at present furnished by a criminal trial is admitted by many. So impartial an observer as Sir Paul Vinogradoff observes: "Of all methods of penalising culprits the one most usual in our days, imprisonment, appears to be the most unsatisfactory. There is nothing to recommend it but the ease of its application to large numbers of delinquents. It has been described by all competent observers as an active incitement to further wrong-doing, and it is to be hoped that the difficulties attending other methods will not prevent civilised countries from introducing and carrying out improved systems of penalties. In any case, the fruitful development of the methods advocated by reformers is dependent on the recognition of one great principle—the idea of the *individualisation of the penalty*. This means that the punishment has to fit the moral case of the criminal as the drug has to fit the pathologic case of the sick man. No abstract equations will do: the judge stands to the criminal in the position of the doctor who selects his remedy after diagnos-

¹ Kenny, *Outlines of Criminal Law*, p. 505. The whole chapter, entitled "The Problems of Punishment," discusses recent inquiries into the topic, and furnishes a convenient estimate of their work.

² Hence arises the celebrated fivefold division of criminals by this school into those who commit crimes from passion; those who do so because external restraints were not sufficient to deter them from succumbing to temptation; those, again, who have acquired criminal habits as a result either of their social environment or some other similar cause; those who are suffering from some form of insanity; and those who commit crimes as a result of instincts which have been transmitted to them by inheritance from some earlier stage of human development. Of these five types of criminal, the first two only may generally be reformed, or cured, by treatment. The third class exhibits a general tendency towards incorrigibility, whilst the fourth and fifth classes are nearly always beyond reformation. The last three classes, and more particularly the third, would include those problems of modern social reformers, the "recidivists." For the last three classes, the best treatment is obviously that which separates them from society and which employs them upon work furnishing the maximum compensation to society for the cost of their support.

ing the disease and the resources of the patient's organisation." ¹ To this extent, therefore, the work of the Italian School of Criminologists supplies a universal need; but, like other schools of thought, facing similar problems, it has evinced a tendency to over-theorise and to prove too much. Some investigators have attempted to prove the existence of a definite pathological criminal type, recognisable by the structure of the hands or the head, or even by the colour of the eyes. This theory has not met with the support of those who have examined further evidence dealing with the matter; and it is now fairly definitely established that there is no such thing as criminal type, in the sense that such a type possesses peculiar physical, mental, or moral characteristics. Further, more recent criminologists have again begun to emphasise the value of the deterrent element in punishment in the interests of society.

Jurisprudence, therefore, is a science of general principles, and may be approached from many points of view. As Mr. Frederic Harrison has pointed out, however, the three most important methods of approach are the Historical, the Analytical, and the Comparative.² In the ensuing chapters, each of those methods will be employed whenever it appears that the principle under consideration may be more fully comprehended by an adoption of these methods.

¹ *Historical Jurisprudence*, i. p. 59.

² *Jurisprudence and the Conflict of Laws*, p. 90.

2.—THE MODERN STATE

IT will be shown, when the conception of Law is analysed, that Jurisprudence is concerned almost exclusively with the law which is elaborated and enforced within that type of community which is called the State. This term is difficult to define with accuracy, and is associated with certain others, separation from which is sometimes difficult. For example, a Race is an association of human beings linked by some real or supposed ethnological kinship; a Nation is a community linked by some real or supposed racial tie, and superimposing on that assumption some common governmental organisation. Finally, by the State is meant an association of human beings, whose numbers are at least considerable, united with the appearance of permanence, for political ends, for the achievement of which certain governmental institutions have been evolved. In modern times, too, all states of the most advanced civilisation occupy defined territory, from which the authority and governmental institutions of other states are excluded.

It should be noticed that members of more than one race may be associated together in a single state—as was the case in Austria-Hungary or Russia before 1918; and secondly, groups of persons speaking different languages, or possessing different religions, may be thus associated, as is the position in Switzerland and Belgium to-day.

Further, association for political ends distinguishes the State from other great communities of persons, *e.g.* a Church or a trade union. In virtue of the political functions which the State discharges, it is endowed with a plenitude of power over the lives and conduct of its members. Thus, a society other than a state can punish, in the last resort, for failure to fulfil allotted functions, merely by exclusion, and even this right may be subject to limitations. The State, however, punishes by the infliction (if necessary) of physical harm upon the wrong-doer, amounting in certain cases to the deprivation of the member's life altogether.

Historically, political association seems to have originated in the grouping of members of the family around one of the original progenitors. In some early communities, this grouping centred round the mother, the relation of mother and son being the only

certain fact in societies where sexual unions had not yet acquired the characteristic of permanency. Later, the obvious suitability of the father for leadership resulted in his gradual acquisition of supremacy within the family group, the mother being relegated to the position of comparative subordination. This is the famous Patriarchal Stage of Society, of which an excellent illustration may be found in the chapters of Genesis which deal with Abraham and his household. The next stage is reached when the sub-families, established by the sons on the death of their father, do not separate finally on his death, but remain united for common ends, *e.g.* agriculture and mutual defence. Such larger associations of families, claiming descent from a single common ancestor, are Clans. Their strength is depleted by the loss of the daughters, on marriage, to the clans of the men they have married, but augmented by the process of Adoption, in consequence of which a stranger becomes fictitiously associated with the common ancestor as a result of a legal and religious ceremonial which constitutes him a son, for all public purposes, to the person who takes him in adoption. As a result of this theory, there is a rule of law in many early societies that "adoption must follow Nature"—*i.e.* with regard to the interval of years between the Adoptor and the Adoptee, and with regard to the capacity of the Adoptor to found a family.

When a number of clans permanently associate for common political ends—and, above all, in early times for defence against external aggression—the State has at last originated. Thus, the Jewish Kingdom was based upon the association of the twelve tribes, the common ancestors of which were in turn the children of a common father; whilst the Roman State originates in the federation of clans, whose ancestors were connected (even in theory) by no such tie of kinship.

Modern states, however, have no such origin, real or assumed. They are the products of the Renaissance, replacing an earlier and also artificial conception—that of a United Christendom, at the head of which were the Pope and the Emperor. The birth of the modern State is closely connected with the evolution of international law. The local rulers, who established absolute authority within certain definite geographical areas—*e.g.* England, France, and Spain—found themselves not only possessed of the widest political powers at home, but also freed from the restraints which feudalism had imposed on their dealings with their fellow-rulers during the Middle Ages. In proportion as these rulers appreciated this fact, so did their hostile activities towards other states become more brutal and devoid of principle. This, in turn, reacted upon theories of domestic government, so that we

eventually find Machiavelli holding that it is unnecessary for a ruler always to keep faith with his subjects, and that the ruler is subject to no restraint beyond those of expediency in his government. To check the evil consequences of this in the relations between state and state, international law was developed. To check its consequences in the domestic policy of the State, democracy was established.

Notwithstanding these considerations, the two cardinal conditions of state-existence at the present day are that the external activities of a state are not subject to the control of any exterior authority, beyond that to which the State itself assents, and that in internal affairs, the State is equally free from external interference. It is true there are some states which are subject to the political domination of others, but they, according to Austin, can only be regarded as portions of a larger whole. This view is not altogether free from difficulty. The British dominions have many of the characteristics of state personality, yet they are not independent, being units of the British Empire. From the standpoint of Jurisprudence, however, their legal systems can be considered as separate units, and thus it would seem that, from the legal point of view, at any rate, the characteristic of freedom from control in the regulation of international affairs is more important than that of immunity from external control.¹

Freedom from external interference, however, implies the ability to resist external interference, if threatened. So it is that since the Renaissance, at least, the political power of the State has always been considered as based, in the last resort, upon organised force which is also finally the factor which compels the obedience of members to State institutions.

The circumstances which have led to the evolution of the modern State have been considered by numerous writers, who, in some cases, have sought to employ the theories they advanced to justify some particular course of political conduct within a definite state. An asserted Divine origin does not require special consideration.² One which has provoked a great deal more discussion is the contract theory. It must be emphasised at the outset that all forms of this theory are necessarily fictitious. Political societies are not formed by the assembly of human beings to decide the terms on which they will be governed in the future.

¹ See further, Eastwood and Keeton, *The Austinian Theories of Law and Sovereignty*, chapter iv. The Indian States present a problem more difficult of solution, and their status cannot be reconciled with Austinian theories of undivided sovereignty. Sir Henry Maine, in his "Minute on Kathiawar" (*Report of the Indian States Committee*, pp. 25-6), plainly showed that sovereignty was here divided between the State and the Empire of India.

² See further, Gray, *Nature and Sources of the Law*, Secs. 162-5.

They are the products of historical necessity. According to one variety of the theory, however, as propounded by Locke and Rousseau, society is based on a contract in which the individual surrenders his right of unfettered action to the community in return for mutual protection and support, and the community thereupon proceeds to appoint instruments of government, which are the creatures of the community. If these instruments fail to fulfil their allotted functions adequately, they may be replaced by others. Another version of this theory, as propounded by Hobbes in *The Leviathan*, and reconsidered by Hume,¹ declares that before the evolution of political society, men recognise no law but that of the strongest, and consequently live in a state of perpetual fear. To remedy this some common authority is established.

"The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure to them in such sort, as that by their own industry, and by the fruits of the earth, they may nourish themselves and live contentedly, is, to confer all their power and strength upon one man, or upon one assembly of men, to bear their person; and every one to his own, and acknowledge himself to be the author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgments, to his judgment. This is more than consent, or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner, as if every man should say to every man, 'I authorise and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorise his actions in like manner.' This done, the multitude so united in one person is called a 'commonwealth,' in Latin *civitas*. This is the generation of that great 'leviathan,' or rather, to speak more reverently, of that 'mortal god,' to which we owe, under the 'immortal God,' our peace and defence. For by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him, that by terror thereof, he is enabled to perform the wills of them all, to peace at home, and mutual aid against their enemies abroad. And in him consisteth the essence of the commonwealth, which, to define it, is 'one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the

¹ "Of the Original Contract," in *Political Discourses*.

strength and means of them all, as he shall think expedient, for their peace and common defence.”¹

Louis xiv. put the whole matter very shortly—“*L'état, c'est moi.*”

Of a commonwealth, Hobbes declares it to be instituted “when a multitude of men do agree, and covenant, every one, with every one, that to whatsoever man, or assembly of men, shall be given by the major part, the right to present the person of them all, that is to say, to be their representative; every one, as well as he that voted for it, as he that voted against it, shall authorise all the actions and judgments, of that man, or assembly of men, in the same manner as if they were his own.”²

From the institution of the commonwealth, Hobbes deduces the rights of him to whom is committed the government, and he concludes (1) that “they that are subjects to a monarch, cannot without leave cast off monarchy,” and (2) that “because the right of bearing the person of them all, is given to him they make sovereign, by covenant only of one to another, and not of him to any of them; there can happen no breach of covenant on the part of the sovereign,” and consequently “none of his subjects, by any pretence of forfeiture, can be freed from his subjection.”³

It will easily be perceived what an important part these two varieties of the Original Contract theory played in the history of eighteenth-century Europe.

Austin, however, has energetically demolished this theory, objecting that, as an explanation of the duty of subjects towards their sovereign government, it is needless and inappropriate, nor would it be binding legally, religiously, nor morally. Furthermore, “an original covenant properly so-called, or aught resembling the idea of a proper original covenant, could hardly precede the formation of an independent political society, nor has it any foundation in historical fact.” In spite of this and other energetic refutations of the doctrine, the fact remains, as Dr. Jethro Brown indicates in his note to Austin, that “the social contract theory, triumphantly slain by many generations of writers, *will not die*,”⁴ and contains a certain underlying element of truth.

In his account of the establishing of the “leviathan,” Hobbes incidentally mentions what have been generally regarded as the two primary functions of a state—the elaboration of adequate methods for defence of the community against external aggression, and the establishment of organs to ensure the just enjoyment of each member’s legitimate interests within the community, or

¹ Chapter xvii.

³ *Ibid.*

² Chapter xviii.

⁴ *Austinian Theory of Law*, p. 227.

more shortly, the preservation of order, through the administration of justice. The regular and efficient discharge of these two functions through the exercise, in the last resort, of force, differentiate states from other communities.

For the discharge of these functions, experience has led to the division of governmental power into three aspects—legislative, judicial, and executive—specific organs having been developed to permit the exercise of such powers. So, in all modern states there exists a Legislature, in which rules binding on the community are made, an Executive which enforces such rules upon the members of the community, and a Judiciary which determines whether an infringement of the rules has occurred, and if so, decides, within limits prescribed by the Legislature, what is the appropriate punishment. The analysis of the composition and powers of these governmental organs is the province of constitutional law.

Formerly, adopting the method followed by Aristotle, it was customary to divide states into three classes—Monarchies, Aristocracies, and Democracies—corresponding to the exercise of governmental power by a single person; by some definite order, few in number; or by the majority of the people themselves, either directly or through their representatives, chosen by them. At the present time, it is usual to follow a different method of classification, states being termed Unitary or Complex (or Composite). A unitary state is a single undivided whole for governmental purposes, although the chief organs of government may find it expedient to delegate some of their powers to inferior organs for certain limited purposes. A good example of such a unitary state is Great Britain. In a Complex or Composite State, on the other hand, the task of government is divided between two or more sets of organs, any or all (except one) of which may have authority over some particular portion of the State's territory only. The remaining organ has a general authority over the whole territory, but it is limited to certain types of activity, the remainder being committed to the local governmental authorities. The United States is a good example of this type of state, political power being divided between the Federal Government and the governments of the separate states.

There remains for consideration the question of state-membership. Members are of two kinds, being either permanent or temporary. The former are the citizens or subjects of the State, the others being aliens temporarily resident within the territorial limits of the State. The characteristics of citizenship are determined by the municipal law of each particular state, but it should be observed that citizens may be natural-born, or may become

such by process of "naturalisation," in virtue of which a person born a citizen of one state renounces that citizenship, and acquires the citizenship of another state. Citizenship may, and usually does, imply special rights, both public and private, not possessed by other members of the State.

All members of a state owe it allegiance. Citizens owe it permanent allegiance, and in return, are entitled to the protection of the State so long as they remain citizens. A resident alien, however, owes allegiance to the State in which he resides, only so long as that residence continues, and that is, in turn, the only period during which he may expect protection from the State. On the other hand, the resident alien owes, in addition to his temporary allegiance, a permanent allegiance to the State of which he is a citizen, though this is for the moment limited by the fact of his residence abroad, as is also his right to protection from the State of which he is a citizen. This protection, while he resides abroad, is indirect, but it exists, and may become direct, if he is treated with unfair discrimination by the State in which he resides.¹

Allegiance implies submission to all properly authorised commands of the State, and acceptance of the tribunals of the State as the vehicle for determining and enforcing those commands.

¹ See further, Kecton, *Extraterritoriality in China*, vol. ii. pp. 98-100.

3.—SOVEREIGNTY

FEW parts of the province of Jurisprudence have been debated so constantly and so conflictingly as the question of Sovereignty. In the present chapter, an attempt will be made to indicate one or two of the main features of the subject, together with some of the principal theories advanced. For further discussion of those principles, it will be necessary to consult the works of some of their chief supporters.¹

In dealing with theories relating to the formation of the modern state, it was noticed that Hobbes declared that a modern state came into existence when a number of individuals agreed together to surrender their rights of self-government to some person or group of persons to whom was entrusted the task of governing the whole community. That individual or group is termed by Hobbes the "Leviathan," or "mortal god," who must use the power entrusted to him for the common security. It is obvious that this power, to be effective, must be extensive and unquestioned within that community. What is the extent of the power so conferred has provoked endless discussion.

In the Middle Ages, secular, as distinct from religious power, was never regarded as absolute. The lord of the manor had certain power over his tenants, free and unfree. Above him, however, and limiting him in the exercise of this power, was his feudal overlord. Again, his exercise of his power was stereotyped by the fixed condition of society, which in time had hardened into law. Thus, originally in English law, it is possible that a lord of the manor may have considered himself entitled to resume full rights of possession over the land of his tenant in villeinage on the death of the latter. Eventually, however, this power was so restricted that the lord's right extended only to the resumption of possession in order to re-grant the land to that successor of the tenant who was indicated by the habits (or custom) of that manor. Above the overlord again was his overlord, and so on up to the Emperor, who had no overlord; but his power was strictly regulated by feudal law, which he was as powerless to alter as his tenants. This feudal law prescribes what aids are to

¹ For a summary of these conflicting views, and a restatement of the Austinian position, see Eastwood and Keeton, *The Austinian Theories of Law and Sovereignty*.

be exacted from undertenants. If the king or duke wants more, they must consent to the levy. If they refuse it, they are not bound. So with legislation. Thus, in mediæval Europe, innumerable local governments existed with overlapping authorities, each limiting the authority of the magnate immediately below, and each in turn being limited by the authority of the magnate immediately above, and all being limited by the Law.¹ Again, every member of Christendom was subject to the Law of the Church. Here was a further overlapping of secular and ecclesiastical jurisdictions.

The Renaissance finally destroyed this theory of society, and a number of Nation-States emerged, each acknowledging no checks whatever upon its internal authority. Within these states existed monarchs, or small groups of persons wielding absolute power, and constantly altering the lives of their subjects to fit their national policies. Thus, in Germany, the princes, by the policy of *cujus regio, ejus religio*, laid down in treaties with each other, agreed that each prince had sole and unlimited authority within his dominions to establish his own form of religion. So, in England, the Established Church came into being at the will of the monarch, ratified in the supreme deliberative body of the State. These new activities required a new theoretical basis. To fit the changed facts of political life arose the modern doctrine of Sovereignty.

Innumerable works of this period reflect this new development in political theory, but incomparably the most important was *Les Six Livres de la République*, by Jean Bodin (1530-1597). In this work, Bodin made a complete and scientific survey of politics in a manner that has influenced every succeeding generation. Much might be written concerning his view of the origin of the State and the nature of citizenship, but it would only be incidental to the subject, and we must hurry on. For present purposes his theory of sovereignty is most important for us. He takes pride in the fact that he is the first jurist to attempt to define the term, and he does this as follows: "Majestas est summa in cives ac subditos legibusque soluta potestas." The very fact of the definition, over and above the terms of it, indicates how far the science of politics has travelled in a century. As far as the sovereign body (which Bodin usually envisaged as an absolute monarch, since this was the contribution of the Renaissance to politics) is concerned, it is the source of all law, and its law-making power is unfettered. Nevertheless, the Law of Nature (which has considerably modified operation in Bodin's treatise) should impel a sovereign to keep faith with another sovereign,

¹ See further, Eastwood and Keeton, *op. cit.* chapter iii.

and to respect proprietary rights. Thus, the distinction between the proper exercise of sovereign power and tyranny is one of natural and not positive law. It is, of course, obvious that Bodin's position differs fundamentally from that of Machiavelli, for while the latter can conceive of no moral or natural restraints upon the action of his sovereign (again visualised as an absolute monarch), Bodin on the other hand insists upon them, and so delineates the scope of the law of nations.

Bodin is thus the originator of all modern theories of the State. Succeeding generations have modified his original conceptions to substitute a body ultimately responsible to the people as a whole for his absolute monarchy, but his attributes remain practically unaltered. Hobbes' indebtedness to Bodin is clear; and following Hobbes we have Bentham; and ultimately, John Austin, whose theory of Sovereignty is still the starting-point of juristic speculation.

Austin's definition of Sovereignty is as follows: "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent."¹

According to Austin, therefore, sovereignty has two aspects. In its external aspect it implies that the supreme political authority is not in the habit of obedience to any political superior; and in its internal aspect it implies that the supreme political authority habitually receives obedience from the bulk of its subjects.

Certain objections to the Austinian theory as it stands will be considered shortly. It must first be noticed that sovereignty, as conceived by Hobbes and his successors, has three main characteristics:

1. That sovereignty within a state is essential.
2. That sovereignty is indivisible.
3. That sovereignty is unlimited and illimitable.

Not one of these propositions has escaped criticism.

1. *Essentiality*.—Until recently, this characteristic has escaped unchallenged, since it seemed clear that within every community politically organised there must exist some person or group of persons whose authority is unquestioned, and whose will habitually prevails within that society. It is assumed that the society is politically independent, otherwise it may be regarded as part of a larger political whole.

In his inaugural address as Dean of the Faculty of Law in

¹ *Austinian Theory of Law*, p. 97.

London University, in 1924, however, Dr. Jenks vigorously attacked the idea that sovereignty is essential. The burden of his argument was that sovereignty is, at bottom, merely organised force, and that the monster which we have raised in our midst and clothed with a plenitude of power—what Hobbes termed “the Leviathan”—is not a necessary and permanent condition of our political and legal existence, but a transitory one, and that in time, Law, as an all-pervading Harmony, will regulate human existence without the somewhat primitive assistance of organised force applied by the sovereign. The idea is not a new one. In Chinese philosophy it is recorded :

“The Emperor said : ‘Kaou-Tiao, that of these ministers and people hardly one is found to offend against the regulation of government is owing to your being the Minister of Crime, and intelligent in the use of the five punishments to assist in the inculcation of the five duties with the view to the perfection of my government and that through punishment, there may come to be no punishment, but the people accord with the path of mean. Continue to be strenuous.’”¹ In both the ideal of Professor Jenks and that of the Chinese philosopher there is a plain hint of a Law of Nature, or system of precepts of pure reason, which all men obey simply because they *are* precepts of pure reason, and not because force compels obedience. But we are a long way yet from the time when the lion and the lamb will lie down together—and meanwhile sovereignty remains essential.

2. *Indivisibility*.—In each state, it is asserted, there is one person or defined group which is politically supreme, and one only. This seems obvious. Two equal and opposite conflicting wills nullify each other. Critics of this proposition view the matter from another angle. They consider the English constitution, and come to the conclusion that legislative sovereignty resides in the Crown and Parliament, whilst executive sovereignty resides in the Crown, Parliament being no part of this sovereign. From this it follows that Parliament is supreme and uncontrolled within its own sphere, to the same extent that the Crown is supreme and uncontrolled within its sphere.² This view is held by two such eminent authorities as Anson³ and Salmond,⁴ but it seems to be based upon a misconception, and Austin’s analysis, as far as the English constitution at least is concerned, is the right one.

¹ Dr. Giles, *Sboo King*, p. 59. For the views of Duguit and Laski, see Eastwood and Keeton, chapter iv. For a further explanation of the Chinese view, see Duyvendak, *The Book of Lord Shang*.

² See further, Salmond, *Jurisprudence*, Appendix II.

³ *Law and Custom of the Constitution*, vol. i., Introduction.

⁴ *Loc. cit.*

In the first place, the division of the province of government into self-contained, non-overlapping spheres is largely illusory. The executive frequently exercises legislative functions, just as the legislature frequently exercises executive functions. According to Anson and Salmond, therefore, we should be compelled to say that the sovereign executive, in legislating, was subordinate to the sovereign legislature, just as the sovereign legislature, in performing executive acts, is subordinate to the sovereign executive, *i.e.* a body can be sovereign for one set of purposes, and subordinate for another set. Again, assuming a conflict between the executive and the legislature with respect to the boundaries of their spheres, according to what principles will it be settled? In other words, whose will eventually prevails, and assuming any decision at all, what becomes of the pretensions to sovereignty of the losing branch of government? To regard both the executive and the legislature as supreme, each within its own sphere, in England, seems to ignore the main lesson of constitutional history—that such views were formerly held in England with respect to sovereignty (*e.g.* the Stuart exaltation of the prerogative), and that the issue has now been decided in favour of Parliament, which alone is sovereign in England. To say that a body is sovereign with respect to certain classes of acts and not with regard to others implies that the body may not perform the forbidden acts because some exterior authority will restrain it, and so eventually that the exterior authority, and not our original body, is sovereign. The point becomes clearer when the English constitution is actually considered. The Crown habitually performs certain acts, legislative in form, with the necessary permission of Parliament. If it did them without first obtaining parliamentary permission, Parliament would restrain it. That was one of the reasons why the Civil War was fought and the settlement of 1688 was necessary. On the other hand, if Parliament decided in due form to abolish the executive and perform all executive acts itself in future, nothing could restrain it—certainly not the executive. Thus the distinction between legislative and executive sovereignty is fallacious with respect to the English constitution. A further attempted elaboration of a possible judicial sovereign in England¹ is inadmissible for similar reasons. It is essential that a rule enunciated by a sovereign should not be subject to exterior contradiction—yet all decisions of the House of Lords (the asserted judicial sovereign before 1911) were subject to immediate nullification by Act of Parliament.²

¹ Salmond, *loc. cit.*

² For similar views, see Jethro Brown, *Austrian Theory*, p. 174.

More difficult questions on the same point may arise under a federal constitution, which gives supreme control—legislative, executive, and judicial—with regard to certain topics to the states, absolutely forbidding interferences on these topics by federal government under similar conditions. Is not sovereignty divided here? But a further question may also be asked: Is either type of government—federal or state—properly sovereign at all? The consideration of these questions will be attempted later.¹

3. *Illimitability*.—By this it is implied that the authority of the sovereign is free and uncontrolled, and infinite in extent. Thus, everything may legitimately be made an object of sovereign power, even though for the moment it is not subject to regulations issued by the sovereign. So, formerly, sovereigns attempted to control the religious beliefs of their subjects, and did so, in so far as the infliction of heavy penalties for external evidences of deviations from the religious standards of the community may be regarded as control. That the sovereign does not at present attempt such control is not due to any limitation of sovereignty, but purely to expediency.

Nevertheless, this assertion of illimitability must be understood to accept certain limits inherent in the nature of the sovereign person or group, and which are limitations in fact, and not of law. Thus, an eighteenth-century sovereign could not legislate with regard to television, since such an object of legislation was beyond the sphere of his experience. This is a limitation dependent upon the limitation of the intellect of the sovereign himself. Again, there are some laws which the sovereign does not frame because they would meet with general condemnation from the community subject to them. Thirdly, certain rules are not adopted because they would conflict with the international security of the State. An example of this would be a French law to enforce the compulsory teaching of French in Italian schools. Lastly, it is impossible for the sovereign to legislate with the object of changing the natural order of the Universe. It has only been done on one occasion—when Joshua commanded the sun to stand still—and the circumstances were exceptional, and hardly likely to recur.²

It was formerly held that there were rules which the sovereign could not make because they conflicted with some higher law.

¹ On the question of divided sovereignty in the Indian States, see Sir Henry Maine's note on Kathiawar, mentioned in Chapter II.

² It may be objected that Moses similarly legislated—but the Jews were not yet a State.

Thus, Coke held that an Act of Parliament which conflicted with Natural Law was void—but this theoretical limitation has long been abandoned. An Act of Parliament must always be enforced, whatever its content.

Upon occasion, the sovereign has even attempted to limit its own authority, by removing certain topics from its sphere of future action. Thus the Act of Union with Ireland provided that the Irish Church should never be disestablished—but an Act providing for such a disestablishment was enforced.¹ This in itself is an excellent illustration of the fact that the powers of the sovereign are incapable of legal limitation.

A more serious criticism of the Austinian view of sovereignty is based on the fact that Austin draws no distinction between legal and political sovereignty. This point is developed by Professor Dicey² with extreme lucidity. The power of Parliament to regulate the life of the community by means of the laws it frames is complete and untrammelled. Parliament is therefore the legal sovereign in England. On the other hand, "that body is politically sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state."³ In this sense, therefore, the electors exercise political sovereignty in England. But this political sovereignty is just as much a static conception as legal sovereignty. It describes only a state of affairs found to exist in England at the present moment. Assuming a small party of militarily organised persons coerced the electorate, and eventually dominated the constitution, that party would be the actual political sovereign, and it would be open to that party to acquire legal sovereignty as well, by making the necessary constitutional changes.

It is, therefore, clear that the existence of political sovereignty is in itself a limitation on legal sovereignty, albeit the two conceptions are on entirely different planes. Political sovereignty is the fact of unlimited dominating conscious force within a community. Legal sovereignty is a legal conception—the lawyer's explanation of the method in which that physical force transmutes itself into legal consequences. Is it possible to reconcile these two conceptions? Before this can be answered, we must consider the deferred question of sovereignty in a federal state.

In the United States, governmental power is delimited to state and federal constitutions by a document which is termed the Constitution. The state government cannot trespass upon the province of the federal government, nor can the federal govern-

¹ See further, Jethro Brown, pp. 157 *et seq.*

² *Law of the Constitution*, chapter i.

³ *Ibid.* p. 70.

ment trespass upon the province of the state government. A judiciary independent of both decides disputes. In the federal and state governments, the legislatures legislate, and the executives administer the laws independently of each other—the executive cannot abolish, or modify, the legislature, nor *vice versa*. Again, the judiciary decides conflicts of function. The existence of all these limited authorities is derived from the written Constitution, which can only be modified by a rather complicated body comprising two-thirds majorities in both houses of the federal legislature plus three-fourths majorities in the legislatures or conventions of the states. This body has proposed a score of amendments in a century and a half.

Where, therefore, is legal sovereignty in the United States? It is not in the legislatures of the states, nor in the federal legislatures, nor in the executives of states or federation. Nor is it in the federal judiciary; for the authority of all these is limited. Sovereignty can hardly be said to reside in the Constitution, for this is inanimate and can therefore exert no power. Is it in the amending body, since the authority of this is uncontrolled and absolute? This seems the only tenable explanation according to all conceptions of sovereignty so far expounded.

There exists, however, a different theory of sovereignty, enunciated by Dr. Jethro Brown.¹ Briefly, it regards the State itself as a corporate entity, with an organised will. The members of this corporate entity are the citizens of the State; and this body is sovereign. It expresses itself through definite organs, to each of which is delegated some governmental power. According to this hypothesis, therefore, the Constitution of the United States would constitute the terms on which the members of the corporate state associate, and these can only be altered by the expression of the will of the members in prescribed form. The State, however, differs from all other corporations in that there are no limits to its authority.

It is difficult to resist the implications of this theory, since it is not only adequate to explain the mechanism of unified and federal states, of states with omnipotent parliaments, and states with legislatures of limited competence, but also it provides a method of reconciling legal and political sovereignty. Legal sovereignty implies absolute power within the realm of law, *i.e.* an unfettered power of promulgating and enforcing legal rules. Political sovereignty implies the practical power of dominating a political society. In Jurisprudence we consider only the former, but both operate completely within the orbit of the sovereign state.

¹ See *The Austinian Theory*, Excursus B.

4.—LAW

AT the very outset of a discussion of Law, we are faced with a difficulty, caused by the union of several ideas in a single term. It is obvious that we do not mean the same thing when we speak of "*the Law*," or law generally, as when we speak of "*a law*," meaning some particular law. In most foreign languages this distinction is still more clearly marked, for different words are used to convey the different ideas. Thus :

A law: *lex, loi, gesetz, legge.*
The law: *jus, droit, recht, diritto.*

Again, most unfortunately, the foreign terms mean something more than law. They include also the sense of Justice, or Right, and also of a collection of Rights. In English, however, we are spared that confusion. The phrase "the law" has no connection with the more abstract conceptions of Justice and a collection of Rights. Sir John Salmond sees in this difference between English and Continental terminology a reason for the divergence between English and Continental juristic thought; to which Mr. A. L. Goodhart replies: "Plausible as this theory may sound, it is doubtful whether it is actually correct. The word *jus* had the same double signification, but the Romans were as essentially practical as the modern English jurist. Is not the difference due rather to the fact that for over six hundred years English justice has been centralised and efficient, while that on the Continent has been in a constant state of flux? It has been unnecessary to justify the existence of law to the English reader. Perhaps the recent popularity of philosophic legal discussion in America is due to the fact that the administration of law is less certain in that country than it is in England."¹ Neither explanation seems entirely convincing. Sir John Salmond suggests that it is the difference in nomenclature which has caused the difference between English and Continental Jurisprudence; but the first difference is no more a cause than the second. They are both, in fact, the results of a more fundamental difference—the difference in law between England and the Continent. Mr. Goodhart expressly indicates that the Romans, although as practical as English jurists, nevertheless preserved the double signification.

¹ *Cambridge Law Journal*, vol. ii. p. 136.

This seems to supply the clue. The nations whose languages contain a word denoting at once law, justice, and rights have all derived their law from Rome, and it is a natural consequence that they should have derived their fundamental legal conceptions from the same source also. The English, however, have built up their system from their primitive institutions, and their original language, therefore, naturally supplies names for the legal conceptions they evolve—conceptions which, from the circumstances of their development, are naturally different from those of the Roman Jurisprudence. It is thus no accident that “law” is Anglo-Saxon, and not derived from the Latin.

To obtain a true idea of what we mean by the term “Law,” it is necessary to examine what it implied in early society. The earliest rules requiring general observance, and enforced by penalties, seem to have been those imposed by the head of a household upon those under his control. In this sense, it is clear that Law precedes the state in origin, since the state only emerges when several clans federated for their mutual protection. Thus, the early chapters of Genesis describe in picturesque fashion the power which Abraham wielded over his household. At the same time, another conception of Law is visible—this time as the dominating force of the universe. In this sense, Law becomes definitely an attribute of God and is responsible for regularity in the universe. Thus, God promises Noah: “While the earth remaineth, seed-time and harvest, and cold and heat, and summer and winter, and day and night shall not cease.”¹ This conception of Law as the guiding force behind all things appears in the philosophical conceptions of many other ancient peoples.²

Confronted with this exceedingly general theory, we may well ask what has led mankind to assume that law is a natural, or a divine, ordinance regulating the universe; and the conclusion we reach is something as follows: Man, endowed with reasoning faculties, and confronted everywhere with phenomena which he cannot completely understand, seeks nevertheless to discover some hypothesis which will fit these phenomena. He notices that one of the most striking characteristics of the material universe is its orderliness and regularity. Certain things are uniform. If various elements of a situation are present, a certain conclusion inevitably follows. Thus, if a stone held in the hand is released, it falls; again, summer always occurs between spring and autumn, but never between autumn and winter; and crops sown in the

¹ Genesis viii. 22; cf. Psalms viii. 3-9 and lxxiv. 12-18 for expressions of the same idea.

² Cf. Holland, *Jurisprudence*, pp. 19-20, and Duyvendak, *The Book of Lord Shang*.

spring always ripen during the summer and are reaped in autumn. Turning from the natural world to human affairs, he is well acquainted with the extremely complex character of human desires, hopes, and fears. He has a vague recollection of the fact that before the existence of human law, intercourse and society were difficult if not altogether impossible; and he knows that whenever law is weak, confusion returns. From these observations, the only possible conclusion to draw is that just as in his tribe, family, or nation, some individual preserves order and upholds law, so in the universe there is some Person or Power, omnipotent as far as human beings are concerned, who does the same. Thus the early Greek, Hindu, and Hebrew philosophers were at one in holding that Law is a command—that behind the Law, there is always the Law-Giver, human or divine. But it must be noticed that in ascribing a Law-Giver to Law as the order of the universe (whether that Law-Giver is God or Nature), they were only arguing by analogy. Order to them was only comprehensible by imagining some agency through which it was secured.

Thus the ancients, in extending the operation of law, by analogy, to the whole of the material universe, emphasised the element of order in its composition. When the extension had been accomplished, they postulated a law-giver, thereby stressing the element of *command* to be found in law. This progression of ideas is significant, and not accidental. It would be impossible to find it reversed. Investigation of the customs of primitive peoples demonstrates that the “taboos” of these peoples, although they might originally have possessed a certain meaning, gradually cease to have one, and are ultimately observed for no other reason than force of habit. Of course, there is a punishment for their breach—but the punishment itself is not based upon any conceivable reason, but habit. Thus, a man who infringes a “taboo” is not punished because his action is illegal, irreligious, or immoral, but solely because he has infringed a “taboo,” and persons who committed such infringements have always been punished in that way. So it is that, at a much later stage of civilisation, we have the laws of the Medes and the Persians “which are unalterable” and societies where the penalty for proposing a law which was rejected by the people was death. (Here the element of order is preserved at all costs.) One could scarcely wish for better examples of the desire of peoples to preserve their legal habits unchanged than these. Fixity of habit is preserved sometimes at the cost of reason itself.

Thus, we perceive in early peoples an unconscious striving after immutability in law. The laws of Nature were eternal and

changeless, and they produced harmony. Should not human laws, therefore, strive to imitate them? Besides, if God gives the law, what right have mere human beings to change it? Hence, we may say that in early societies, the element of uniformity in law is predominant. Later, with the rise of the State, the evolution of central government, the State's control of justice, and the idea of the State's arbitrary power, particularly as manifested in legislation, the idea of uniformity, or of "law and order" in law, is gradually replaced by the idea of a law as the command of a sovereign. So it is that, ultimately, Austin defines law as follows: "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." But the older idea is reflected in Blackstone: "Law, in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of objects, whether animate or inanimate, rational or irrational."¹

The task of defining law is, therefore, not an easy one. Blackstone's definition may be rejected as too wide—it includes a great deal which is not really law at all. It would include the Law of Gravitation, the Law of the Conservation of Matter, and the Laws of Bridge. On the other hand, Austin's definition is too narrow. Putting aside the question of International Law, it would exclude a good deal of early custom, which seems to have originated principally in habit, or compliance with human emotions. Again, Sir Frederick Pollock objects:

"We should hardly give the name of law to a series of unrelated and inconsistent commands enforced by arbitrary and uncertain methods, although their subject matter might be the same as that of the kind of laws we are used to. The capricious orders of a crazy despot may be laws according to Austin's definition until they are revoked; but if so, it is the worse for the definition."²

The first part of this seems a valid objection. As far as the second is concerned, Austin would probably reply that a crazy despot is not an intelligent human being. Sir John Salmond approaches law from another angle: "Law may be defined as the body of principles recognised and applied by the State in the administration of Justice. In other words, the law consists of the rules recognised and acted on by the Courts of Justice."³ This definition is open to objection. The second part of it does

¹ *Commentaries*, i. 38.

² *Essays in Jurisprudence and Ethics*, p. 50.

³ *Jurisprudence*, p. 39 (7th edn.).

not necessarily mean the same as the first. Mr. Goodhart demonstrates this in criticising parts of it. "Admirable as this definition may be as an ideal" he says, "it can hardly be accepted as a practical solution of the question. The obvious answer to it is that it does not include laws which are unjust. Such rules nevertheless are laws. A definition of the whole must include all of the parts. A minor criticism of this definition is that certain laws are recognised and enforced solely by administrative officers, and the Courts of Law are not permitted to take cognisance of them. This has always been true on the Continent and can even be found in exceptional cases in England, as, for example, in the case of the exclusion of aliens. As Professor Pound has pointed out, administrative law has been developing rapidly in the United States, and many questions are no longer justiciable in the Courts of Law. Is not the primary purpose of law order rather than justice? Law and order are two terms which cannot come into conflict. Law and justice are terms which, unfortunately, are frequently contrasted."¹ The only valid objection to Mr. Goodhart's argument seems to be that it tends to subordinate the idea of justice to the idea of order—a subordination which, if it were accepted, would be bad for the science of Jurisprudence, as well as for the law itself. It has already been noticed that the ancients seized upon the most outstanding characteristic of law at the time—order—and on that account extended the term "law" to the material world in general; but this is not to say that they regarded order as the primary end of law. The Old Testament, especially, for every single time that it mentions the orderliness of the universe, mentions the justice of God in creating such a system at least twenty times; and the laws of Moses are based upon an abstract conception of right or justice, and not upon the necessity for orderliness. In places, this abstract conception of right triumphs over the letter of the law, as in Deuteronomy xv., where it is provided that all creditors should release their debtors who had given themselves as bondmen, every seventh year. This sometimes had the effect of releasing the debtor almost at once, and accordingly it is commanded: "If there be among you a poor man of one of thy brethren within any of thy gates in thy land which the Lord thy God giveth thee, thou shalt not harden thine heart, nor shut thine hand from thy poor brother; but thou shalt open thine hand wide unto him, and shalt surely lend him sufficient for his need, in that which he wanteth.

"Beware that there be not a thought in thy wicked heart, saying, The seventh year, the year of release, is at hand; and

¹ *Cambridge Law Journal*, vol. ii. p. 136.

thine eye be evil against thy poor brother, and thou givest him nought; and he cry unto the Lord against thee, and it be sin unto thee.

"Thou shalt surely give him, and thine heart shall not be grieved when thou givest unto him: because that for this thing the Lord thy God shall bless thee in all thy works, and in all that thou puttest thine hand unto."¹

Nor were the Jews alone in their high conception of law. Among the Romans, the desire for orderliness was satisfied by the existence of a Civil Law; but an abstract conception of Right or Justice, higher than that realised by the existing law, compelled them to institute a system of equitable rules, based on the Edicts. Similarly, in modern systems of law, there are many innovations which may be traced to the desire of the community to realise some higher standard of justice than that attained by the existing system of law. In England, for example, this impulse led to the development of Equity in the Court of Chancery. It would, therefore, seem that the element of justice should find some place in a definition of law.

Sir Paul Vinogradoff defines law as "a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things."² This is a good definition, except that there is no hint in it of the purpose of law. Accordingly, therefore, we may say that the purpose of law is the administration of justice, and one of its primary characteristics is order. It consists in a set of rules elaborated at the instance of the supreme political authority within a state, and enforced by that authority, having for its object the attribution of power by persons over persons and things. It is to be observed that "person" does not in this case mean a human being. It signifies any individual, body, or thing, whom the law deems capable of being invested with such power.

It is now necessary to separate Law, as understood in Jurisprudence, from some things improperly termed law, and again from other rules which, though laws, are not state-laws. The propensity of early peoples for noticing the characteristic of order, and then for assuming that order is the result of a command, has already been noticed. In the present state of our scientific knowledge, we are not entitled to say more than that, if a stone is dislodged, it will fall to the ground. We have no authority for saying that it was ordered by some Divinity, or some such abstraction as Nature, to fall to the ground. Thus, as Huxley³

¹ Deut. xv. 1-11.

² *Common Sense in Law*, p. 59.

³ "It is desirable to remember that which is very often forgotten, that the laws of Nature are not the causes of the order of Nature, but only our way of

aptly put it, these laws express nothing more than the fact that stones do fall. Consequently, physical laws, or, as they are sometimes known, the laws of Nature, are nothing more than laws by metaphor.

Connected with the idea of the Divine or Natural ordering of the whole universe, is the conception of the Law of God, or the Law of Nature, regulating the actions of men. The Greeks, in the course of their philosophical speculations, elaborated the theory that Nature, through the dictates of human reason, had partially revealed a code of perfect law, to which all human law tended to approximate. Human law was, therefore, of inferior authority to natural law. This doctrine, which was most fully developed by the Stoic school, the Roman jurists adopted, and incorporated into their works, thus providing a philosophical basis for the *jus gentium*. From the Roman jurists, the theory was transmitted to the mediæval schoolmen, and here it received considerable reinforcement. The Christian Church derived from the Jewish faith the idea of a law of God, to which again it was the aim of all human law to approximate, and which also was of superior authority to human law. Mediæval lawyers, therefore, combined the two ideas, using the product as the basis of their investigations into the nature of mediæval Christendom. At the Renaissance, Natural Law was, for a brief period, in danger of being discredited when faced with a more positivist school of philosophers. The contrast between this school and the mediævalists will readily be appreciated if we compare the writings of Machiavelli with those of Thomas Aquinas. But the conception of Natural Law owed still a further duty to European thought. It materially assisted the growth of a system of international law. We read much of Natural Law and natural rights in the works of Grotius, Pufendorf, Thomasius, Wolff, and Vattel; and although the only practical basis of international law is now generally recognised to be usage, or custom, the idea of Natural Law greatly facilitated the growth of the science by harmonising it with general philosophy. Finally, the conception has not been without influence upon the revolutionary movements of the modern world. The American Declaration of Independence and the writings of Rousseau sufficiently prove that. Thus we see that the Law of Nature as an idea has materially influenced the theory of law since the days of Aristotle on the one hand, and of the Jewish priestly

stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move" (*Science Primers*, Introductory).

lawyers on the other. What, then, is the nature of Natural Law? Is it, in strictness, law at all? Austin divides laws properly so called into the laws of God (or of Nature) and human laws. He therefore considers Natural Law to be law, but not positive state-law. This, however, was simply due to Austin's definition of law as a command. Since he identified the Law of Nature and the Law of God, he came to the conclusion that this law was the command of God, and therefore law, but not "positive state-law," by which he meant rules framed by human beings, and enforced within political communities. It would appear, however, that since the Law of Nature consists in a series of abstract principles, not framed by men, nor intended to be enforced among any society of men, the Law of Nature is not law, but morality.

The precise nature of international law is entirely a question of definition. If Austin's is accepted, then international law is undoubtedly not law, since it is not commanded by a political superior, but positive morality. But it is submitted that Austin's definition is defective—it overestimates the "command" element present in law, and ignores its historical development. International law is thus *law*, existing between states instead of between persons, and in a lower stage of development than positive state-law—a stage of development, however, through which positive state-law has itself passed.

Those rules which are termed "the Laws of Honour" and "the Laws of Fashion" may next be considered, since they well illustrate the dividing line between law and morality. Austin notices that such rules are not imposed by any determinate authority, but by an indeterminate authority. Moreover, they are uncertain and even variable in nature and extent. Again, these so-called laws, although they are enforced by society (or some section of it) collectively, are nevertheless not enforced by any determinate organ of society. What court or tribunal administers the Laws of Fashion? Perhaps the erratic nature of such rules of morality may in some degree be traced to the absence of regular organs enforcing them. From these considerations it will be clear that the Laws of Honour, and of Fashion, and similar rules set by public opinion are not law but morality.

So far we have been considering Law in the abstract. It will now be convenient to discuss *a* law. Austin defines a law as "a command which obliges a person or persons to a *course* of conduct." This definition is now generally admitted to be defective. As a protest against the vague and inaccurate definitions then popular, it undoubtedly performed an exceedingly useful function, but, as a final statement of what law is, it is impossible. In the first

place, all laws, even statute-laws, cannot be expressed in terms of a command. Many of them are permissive. They say that if a certain course of conduct is pursued, the State will protect the action of the doer. Thus, if a man makes his will in conformity with the regulations of a statute, the State will give effect to his will ; but there is no *command* by the State to individuals to make wills in the prescribed form. Further, there are statutes which repeal statutes ; they permit things to be done which were previously forbidden. Here again the element of command is missing. It is sometimes argued that in such cases, the State commands the judges to permit certain things ; but such an interpretation seems an unjustifiable straining of language, and was assuredly not contemplated by Austin himself, who admitted that "the proposition that laws are commands must be taken with limitations," adding later, that laws to explain laws could hardly be regarded as laws properly so called, whilst laws to repeal laws are revocations of commands, or permissions, and as such constitute clear exceptions to his definition.¹

A second objection to Austin's definition is that a considerable portion of the law of some civilised states is made by the judges through case-law. Disentangled from the arguments which have somewhat obscured the function of the judges, the fact is clear, that in such cases, the State permits the judges to make the rules which appear in the form of judicial precedents. Can this permission, therefore, be considered to operate so that the command of the judges becomes the command of the State ? If A gives B permission to make rules for the guidance of C, are those rules the command of A ? It seems clear that A may be quite ignorant of the rules so framed by B, or that he may have no opinion one way or the other on the topic with respect to which B frames a rule. In either of these cases it hardly seems that A "commands" the resulting rule.²

A third objection to Austin's definition is one which has already been lodged against this definition of law in general. The definition assumes because a law is now the product of state-activity, that it has always been so. The value of the historical method of approach to the science of Jurisprudence lies in the fact that it teaches that law is older than the State. In primitive societies, the head of the family, tribe, or clan, administers the customs which have been transmitted to him by his predecessors, and which he is powerless to change.

¹ *Austinian Theory of Law*, pp. 22-23. Eastwood and Keeton, *op. cit.* chapter ii.

² See further, on this question, Professor Gray, *Nature and Sources of the Law*, Sects. 195-7.

Finally, the ethical element is completely excluded from Austin's definition. A law is simply a command by a sovereign. Its purpose is completely ignored. This is true also of Professor Holland's definition of a law as "a general rule of external human action enforced by a sovereign political authority." We may say, therefore, considering the objections previously enumerated, that a law is a rule of conduct, administered by those organs of a political society which it has ordained for that purpose, and imposed in the first instance at the will of the dominating political authority in that society in pursuance of the conception of justice which is held by that dominating political authority or by those to whom it has committed the task of making such rules.¹

This definition may appear a little lengthy, but simplicity in the definition of law is not possible, if the essential elements are to be included within the definition.

¹ Professor Jethro Brown, in Excursus E of *The Austinian Theory of Law*, considers the principal objections to the Austinian view of Law as a state-command under the following heads :

A. As to the Source of Law—

- (i) Law is older than the State.
- (ii) Customs are laws apart from State recognition.
- (iii) Law, not the State is supreme.

B. As to the Nature of Law—

- (iv) A great part of law is not expressible as a command.
- (v) Even where law is so expressible, command is not of its essence.
- (vi) In any case, the representation of law as a command is hopelessly inadequate.

5.—THE EVOLUTION OF LAW

IN the preceding chapter it was necessary to say a little about early law, in order to arrive at a true appreciation of the term *Law*. In the present one, an attempt will be made to indicate the principal steps in the development of law in relation to society. First, however, it is necessary to remember that when we speak of the growth of law in general terms, we are discussing largely a hypothetical growth, for unfortunately all legal systems do not pass through the same stages. This is due to a variety of reasons. Some societies have not within themselves the impulse to develop their laws beyond certain comparatively crude forms. Others seem to jump directly from an early stage to a very advanced one, through contact with cultures more developed than their own. Legal systems do not grow up entirely cut off from each other. There is constant and increasing interchange of institutions and ideas. But at the same time, as Sir Frederick Pollock has pointed out, all development in law follows a certain sequence, "What we do mean is that the order (*i.e.* of progress) is not found reversed. Chalk is not everywhere in England, nor red sandstone; but where red sandstone is, we know that chalk is not below it."¹

When Sir Henry Maine wrote his *Ancient Law*, Historical Jurisprudence looked no farther back than early Roman and Greek law. Since then, the field of inquiry has been greatly widened to include the customs of uncivilised tribes, as well as the laws of the highly civilised ancient kingdoms of China, Babylonia, and Egypt. It is exceedingly hard to produce general conclusions which will fit all these communities. All of them, however, seem to have passed through a patriarchal stage, while the traces of a prior matriarchy are far from definite. In this patriarchal stage, the power of the *paterfamilias* is extensive, his wife, children, and slaves being alike subject to his authority, and his commands are laws. Whatever his children may acquire, they acquire for him. On the other hand, his children (excluding such female descendants of the father who have married, and are now members of other families), on his death, have an inalienable right to share the family property among themselves, perhaps

¹ Note C to chapter i. of Maine's *Ancient Law*, p. 22.

with the provision of a special portion for the eldest son.

When families no longer disintegrate on the death of the *paterfamilias*, another stage in legal, as well as political, development has been reached. Within the family, the power of the *paterfamilias* remains, but in the relations of members with members of other families within the clan, custom, administered by the elders of the clan, operates. Moreover, within all families comprising the clan there is a common clan cult, centring round the veneration paid to their semi-legendary founder, who is considered to be the common ancestor of all, and whose name is usually borne by all members of the clan as a patronymic. Social relations with persons outside the clan are usually regulated by force. The stranger who is not taken in adoption is enslaved, whilst the murder of the member of a clan is punished by the declaration of a blood-feud against all members of the murderer's clan. Of this stage of development there are abundant traces in the history both of European and of non-European races. Rome, in the centuries immediately following its foundation, passed through such a stage, as did Greece a little earlier, whilst there are records of clan-feuds in the time of the earliest Chinese rulers. Among the less advanced peoples of South-Eastern Europe (and notably in Corsica) the vendetta survived until late historical times.¹

Among many peoples, although not universally (for it would seem that the Chinese never passed through such a stage), at the period when a rudimentary state organisation is coming into existence through the federation of a number of tribes into a commonwealth, law becomes closely associated with religion. This seems to be the direct consequence of the development of an elaborate ritual, associated with the clan-cult, which is based, at bottom, on veneration for ancestors, and more particularly for the founder of the clan. Such a clan-cult is found among all peoples where a patriarchal society has developed into a state, formed from a federation of clans. It existed among Chinese families until the break-up of the family and clan as organised units, following the revolution in 1911. In China, however, some of the next stages seem to be lacking. The best examples seem to be furnished by the Ancient Greeks and by the Romans in the period before the XII. Tables. Gradually, the central authority becomes stronger, and is dominated by some single person—usually a capable leader in battle. Thus, we have the period of personal monarchies, in which the kings themselves deliver judgments, or “dooms,” in the disputes of their subjects, in

¹ See further, on the patriarchal stage, Maine, *Ancient Law*, chapter v.

accordance with their interpretations of pre-existing custom. This is the condition of society in the Heroic Age of Homer. Eventually, the monarchy gives way to the rule of a privileged order, limited in numbers, administering a collection of ancient customs of which they are the sole interpreters. These customs, however, are not laws in the modern sense. Rather are they a mixture of laws, rules of good conduct, and religious observances. To use Latin terms (for this stage is very clearly apparent in Rome before the XII. Tables), there is no clear line of demarcation between *jus*, *fas*, and *boni mores*, although the three tend to separate with the advance of society.

Following this comes another stage in the evolution of law. The dominating order in the State not unnaturally utilises its privileged position for its own benefit. This leads eventually to an insistent demand, from the people as a whole, for a code of laws which shall be available for all men to read. Better bad law which is known, they say in effect, than law which is uncertain, for the former may at least be avoided. Accordingly, the popular demand is at length satisfied, but codification is the turning-point in the early legal history of any people. Roman law was codified at a comparatively favourable moment. *Jus* and *fas* had at length become almost completely separated, so that the XII. Tables is an almost completely secular code, and the basis of all subsequent development in Roman law, although, as Sir Frederick Pollock points out, the comparatively early codification of Roman law has tended to perpetuate a form of legal procedure, the archaic foundation of which threatened for a time to arrest the free development of the law. By way of contrast, the codification of the Hindu law, in the Laws of Manu, occurred when the dominating order in the community had assumed a definitely priestly character, and when all law was therefore subject to a religious interpretation—with the result that legal development was finally arrested by the process of codification.¹

These important generalisations, first advanced by Sir Henry Maine, and based upon observations of early Roman, Greek, and Hindu law, have, on the whole, strikingly stood the test of analysis necessitated as a result of archæological discoveries since his day. At the beginning of the present century, an almost complete version of the Code of Hammurabi of Babylon (c. 2000 B.C.) was discovered at Susa, and subsequent research has proved it to be the basis of the law of all the more important commercial nations of the East (e.g. the Phœnicians) between 2000 B.C. and the expansion of the Roman dominion into the Eastern Mediterranean. Indeed, it has been suggested that the

¹ See further, Maine, *Ancient Law*, chapter i.

XII. Tables themselves are based ultimately on the Babylonian Code. However that might be, Hammurabi's Code, which was the starting-point of 1500 years of legal development, is again overwhelmingly secular. This Code, however, was itself anticipated by earlier codes. For example, Urukagina¹ (c. 2700 B.C.), a still more remote Mesopotamian ruler, was the author of a series of reforms, aimed at reducing drastically the fees due to the privileged orders within the community, the nobles, the priests, and the royal officials, whilst there are traces of a more ancient code still, which seems to have been in force in Sumer during the fourth millennium B.C. But all these codes, so far as we know them, have one common characteristic. They are predominately secular, and on account of their adaptability to varying stages of social development, they are passed on with modifications, from one people to another. On the other hand, the much later code of the Jews is throughout subject to religious influences, and is expounded by priests, with the result that it represents rather the idealisation of legal principles than the legal clothing of everyday social relations. As such, it is an admirable starting-point for philosophic speculation, but hardly an adequate medium for the expression of the social relations of a progressive community.

Somewhat apart from this general movement in legal development, is China. Chinese law seems to have been codified as early as 2000 B.C. There was an important re-codification during the Chou Dynasty (1122-255 B.C.), whilst the two great periods of legal activity and re-codification are the Han Dynasty (200 B.C. to A.D. 200) and the T'ang Dynasty (A.D. 600 to A.D. 900). At no period in the long history of Chinese law does religion appear to have exercised any appreciable influence upon its development. On the other hand, all great Chinese legislators seem to have attempted to frame their laws in the form of repressions of improper conduct, in conformity with some philosophical conception of perfect duty, on the part of the individual, towards his family, towards his neighbours, and towards his Emperor. Moreover, all Chinese officials, until the revolution, had the power to punish what they considered to be breaches of moral duties, even if the performance of them was not enjoined by law. Summing up, therefore, Maine's generalisation hardly seems to have any direct application to Chinese law; and it must be remembered that upon this great system was formerly based the laws of the various nations of Indo-China (e.g. Siam, Burma, and Annam), and of Japan and Korea.

¹ On the reforms of Urukagina, see "The Origins of Babylonian Law," by the present writer. *Law Quarterly Review*, vol. xli. p. 441.

Among Western nations, the period following codification seems to be one in which a legal system first becomes conscious of its true functions within a community. In Rome, for example, we find that the XII. Tables are followed by the establishment of the Prætorships, and the formation of the *jus gentium* is begun. Ancient custom must in future give place to rules suitable for a rapidly advancing community. Eventually, we get the evolution of a community of jurists, or an organised legal profession, and a period of intense juristic activity, during which the very foundations of the law are subjected to critical examination and the process of change is rationalised. The process is best illustrated in the history of Roman law, but there is a similar progression in English law, and in China again, we have a similar line of development.

As far as the body of the law itself is concerned, there is one fundamental change which requires brief notice. In the fifth chapter of his *Ancient Law*, Sir Henry Maine points out that early law is largely a law of Status. In other words, a man's rights and obligations, both public and private, are determined by the position he holds in his family, his clan, and in society generally. Thus, in Roman law, we have the slave, the full citizen, the *filiusfamilias*, the married woman, the *dediticius*, and several other classes, all with differing legal potentialities. Moreover, it is difficult, and in some cases even impossible to change from a position of limited capacity to one of fuller capacity. In modern law, however, status has to a considerable extent, though not entirely, disappeared. Every person who may be deemed by the law to form a proper judgment of his own interests, is, in general, free to enter into what legal relations, involving rights and duties, he chooses. This is due to the action of several legal principles of the first importance. In the first place, the family in modern law is no longer the corporate unit for legal purposes that it was in early law. The adult son or daughter now has independent legal existence and full capacity, on attaining what the law deems to be full mental development. Further, modern law has broken down a number of artificial distinctions between man and man, such as were implied in the Roman terms *servus*, *libertus*, *libertinus*, *peregrinus*, *Latinus*, and similar terms. Again, turning to mediæval European law, feudalism determined a man's public rights and duties by the accident of his birth, whilst in many cases, in a humbler sphere of life, an individual's life-long occupation, as villein, farrier, or carrier, was selected by a similar accident. To-day, however, an individual has a greater freedom in these matters. He can enter into or abstain from contemplated legal relations at his pleasure. In fact, in Maine's classic phrase, "the

movement of the progressive societies has hitherto been a movement from Status to Contract," although in the twentieth century there are not lacking signs that Status has recently increased somewhat in importance.¹

¹ *e.g.* the legal status of the trade union. It should be noticed that Maine, in forming this generalisation, was considering primarily material drawn from Private Law. It is in the highest degree doubtful whether it has any application to Public Law, in which the tendency has been for the conception of status to increase in importance, more especially in recent years.

6.—THE SOURCES OF LAW

LIKE many other terms used in Jurisprudence, the word “source” has been employed with more than one meaning.

In common speech, “source” signifies the origin, or beginning, more especially of a stream. It is well to remember this ordinary meaning in Jurisprudence, for it may be used metaphorically to make the technical meaning of the word clearer. Text-book writers have used the term to denote the following meanings, as applied to law :

1. That final authority from which the validity of all laws is ultimately derived. In this sense, the only source of law in modern communities is the State. But it may be objected that the State is rather some organisation, external as far as the law is concerned, enforcing it, and as such, is not a source in the general meaning of the term, and accordingly it ought not to be in the technical sense.

2. The means whereby a knowledge of the law is conveyed to an intelligent human being. In this sense, the Statute-book, the Law Reports, and text-books are sources of law. But it would be more correct to say that these are sources of our knowledge of the law ; they are in no sense origins or beginnings of the law itself, for the law exists before it is recorded in any of these places.

3. The materials out of which the law is eventually fashioned through the activity of the judges. This is the only meaning which can properly be attached to the term “Source of Law,” and it is the meaning which will be consistently applied to it in the following pages.

4. Sometimes also the term is employed to denote the form or shape in which the materials appear when they are moulded by the judges. It is obvious that the distinction between this meaning and the one just given is only very slight, and is primarily one of emphasis. A builder may have round bricks and square bricks, but they are none the less bricks, whatever their shape. As far as the distinction between the two meanings is traceable, it is worked out in the chapter entitled “The Forms of Law,” where the term “form” is employed to denote this fourth meaning.

In his consideration of the material sources of law (by which

is implied a source considered in the sense of the third meaning given above), Sir John Salmond divides them into legal and historical sources. Legal sources are those which must be permitted to influence the growth of a legal system, altogether apart from a judge's inclinations in the matter. Thus statutes are legal sources of law, since they must always be recognised by the judge as fettering his freedom of decision, in so far as they refer to the matter in dispute. On the other hand, historical sources are those "which influence more or less extensively the course of legal development, but they speak with no authority. . . . They are merely the various precedent links in that chain of which the ultimate link must be some legal source to which the rule of law is directly attached." To illustrate his point, Sir John Salmond considers a rule of law which is based upon a precedent. The precedent itself may be founded upon the writings of Pothier, who may have drawn his materials from the *Corpus Juris* of Justinian, who again may have derived them from the Prætor's Edict. In this example, the precedent is the sole legal source of law, so far as English law is concerned, while the others are historical merely. The division of sources, therefore, into legal and historical is a just one, and an important one; but it is not a complete one. There are some occasions when a judge is compelled to make a decision without the aid of any accepted legal source of law—when he is, in fact, thrown back upon his own innate sense of right and wrong. In deciding such a case, he will be subject to the influence of certain factors—*e.g.* religion, or the principles of morality prevalent within a community—which are neither legal, nor again, historical, for they operate directly upon the mind of the judge, and not mediately through legal sources. Moreover, it sometimes occurs that a source of law which was formerly authoritative or legal so far as the courts of a state are concerned, has become through the passage of time only a historical source. Thus, religion was formerly a legal source of law in all countries of Western Europe. Now, it is not so; sometimes it is an historical source of law only; at other times it falls into the class previously indicated, containing influences which operate on the judge only in default of legal sources, and then only at his option. In English law, this difficulty of classifying sources of law is surmounted by denoting a few of them as *binding* sources of law, *i.e.* sources which necessarily limit the freedom of the judge independently of his own volition, and considering the others as *persuasive*, *i.e.* sources which can only be of importance in a judicial decision in default of binding sources, or which have at some previous time influenced the formation of a binding source of law.

It is obvious that although the binding sources of law are few and definite the persuasive sources are fairly numerous, and some of them are of very little importance in a modern system of law. Accordingly, only the more important of these will be considered in the ensuing chapters. For example, a judge, in the absence of a binding source, might conceivably decide a case before him in accordance with a usage he had noted followed by an Indian Civil Servant in settling similar disputes among hill-tribes in India, if it seemed to him the best rule to be adopted. But this and similar sources are too occasional to require further comment. Accordingly, the following sources only will be discussed :

- | | |
|--|--------------------------|
| (1) Legislation | } Binding
Sources |
| (2) Judicial Precedents | |
| (3) Custom | |
| (4) Professional Opinion | } Persuasive
Sources. |
| (5) Religion | |
| (6) Principles of Morality or Equity | |
| (7) Decisions of Foreign Courts of Justice | |

The position of Agreement, a suggested further source of law, will also be considered.

7.—CUSTOM

IN the course of his discussion of law Blackstone declares : “ All these¹ are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon Common Law, for their support.”² In this sentence there is clearly visible the desire to group together all non-statutory sources of law. An eminent American jurist, Carter, elaborates the same view,³ to which Professor Gray has ably replied : “ The true view, as I submit, is that the Law is what the judges declare ; that statutes, precedents, the opinions of learned experts, customs, and morality are the sources of the Law ; that back of everything lies the opinions of the ruling spirits of the community ; who have the power to close any of these sources ; but that so long as they do not interfere, the judges, in establishing Law, have recourse to these sources. Custom is one of them, but to make it not only one source but the sole source, the Law itself, requires a theory which is as little to be trusted as that of Austin.”⁴ It is necessary, therefore, to distinguish between two sources of law which are frequently confused, namely, custom and precedent.

Custom in the legal sense may be defined as those rules of human action, established by usage, which are adopted by the courts because they are generally followed by the political society as a whole, or by some part of it. Thus, great parts of the Law Merchant were introduced into English law by Lord Mansfield, because he found that it was the general custom of the merchants, and it was, therefore, desirable that it should obtain legal recognition. Its first introduction into law was due to the fact that it was custom ; it is followed now because many binding decisions, or precedents, now exist, embodying the principles of the Law Merchant. But if these, for any reason, ceased to be applicable, those principles would again be re-introduced into English law, on the ground that they were custom. Even in modern law, additions owing their origin to the existence of a general custom are still made. Thus, in a quite modern case, it was decided

¹ *i.e.* the doctrines of the Common Law.

² *Commentaries*, i. p. 68.

³ In *Law, its Origin, Growth, and Function*.

⁴ *Nature and Sources of the Law*, Sect. 602.

that debentures made payable to bearer (debenture bonds) of English or foreign companies, even though created by deed, are negotiable in English law.¹ The reason for this extension of the privileges of negotiability was that there existed a general custom among the merchants to that effect.

The reason for the admission of custom as a source of law in a modern state seems to be that before state organs undertook the task of framing adequate laws for the community, this was done by the people themselves, and administered in popular courts. This is certainly true of English law which, before the Norman Conquest, was made up very largely of customs, administered in the local courts of the shire, hundred, and tun, by the freemen of the district. After the Conquest it was the task of the King's judges to weld these customs into a uniform mass, which became known as "the common law of England," or "the universal custom of the realm." Thus the State, in advancing its authority, takes over and enforces customary rules, first formulated by the people themselves for their own regulation.

The nature and operation of custom have furnished a magnificent field of speculation for the German legal philosophers. The historical school, and especially Savigny, held that all early law was customary, and that the function of legislation is supplementary only. From this they develop the further theory that custom is not Law, it is not even a source of Law; it is merely evidence of Law, which already exists in the consciousness of the People (*Volksgeist*). As a necessary consequence of this, it follows that custom, as the external evidence of Law in the abstract, possesses the force of Law before it is received by the tribunals of the State, and not as a result of this process. Thus Arnts² says: "Customary law contains the ground of its validity in itself. It is law by virtue of its own nature, as an expression of the general consciousness of right, not by virtue of the sanction, express or tacit, of any legislature." The word "legislature" would undoubtedly have included the courts, in the view of this jurist. By way of reaction certain English and American jurists have gone to the other extreme. Professor Gray declares: "Not only does custom play a small part, at the present day, as a source of non-contractual Law, but it is doubtful if it ever did, doubtful whether, at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated the rules. It has often been assumed, almost as a matter of course, that legal customs preceded judicial decisions, and that the latter have but served to give expression to the former, but of this

¹ *Bechuanaland Exploration Co. v. London Trading Bank* (1898), 2 Q.B. 658.

² Cited by Salmond, *Jurisprudence*, p. 155.

there appears to be little proof. It seems at least as probable that customs arose from legal decisions.”¹ He then proceeds to cite a passage from Sir Henry Maine’s *Ancient Law*, the text of which is that “custom is a conception posterior to that of Themistes or judgments.” Maine’s own conception seems to be that, in Greek society, in the heroic age, Law existed only in the Themistes of the kings. When the rule of these gave way to oligarchies, customary law prevailed. As Maine puts it, “customs or observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste.” Following this is the era of codification. At the same time it seems rather a bold generalisation to regard all early custom as having its origin in royal dooms. The blood-feuds would hardly seem to have such an origin, since they deny at once the authority of king and judge, whilst self-help, which has survived in modern English law, is customary in origin, and is equally a denial of judicial authority. Some customs, at least, as survivals of early social habits, seem anterior to any central authority, royal or judicial. This point is noticed by Sir Frederick Pollock in an illuminating note to the first chapter of *Ancient Law*. In addition to remarking upon the existence of a good deal of customary law in Homer, he draws attention to Maine’s own comment upon the origin of royal Themistes in *Early Law and Custom*,² where he observes that they “are doubtless drawn from pre-existing custom or usage,” but the notion is that they “are conceived by the king spontaneously or through divine prompting”—a statement which seems to have escaped Professor Gray’s notice when estimating the importance of custom in early times.

Summing up, therefore, we may say that although custom is an early source of law, it is not always the earliest, being preceded in some cases by judicial sentences, though judicial decisions may themselves originate in pre-existing custom. Moreover, much customary law develops independently of the judges, although it is ultimately adopted as a source of law through judicial recognition.³ Lastly, custom in modern law has been practically superseded by legislation.

Customs are either general, that is, they extend over the country as a whole, or else particular and local. In England it is clear that when a general custom is admitted to be a source of

¹ *Nature and Sources of the Law*, Sect. 634.

² P. 163.

³ Professor Gray demolishes Mr. Carter’s theory that all Law is really custom. He also insists on the distinction between custom and precedent as sources of law. Yet he asserts that all early custom (or practically all of it) is derived from judicial decisions. His position is not absolutely clear.

law, it forms an addition to the common law of the realm. A general custom must possess five characteristics if it is to be truly a source of law. In the first place, it must be reasonable. This does not mean that the custom must necessarily conform to the judge's idea of the highest standards of right and reason. It merely indicates that the general trend of the custom should not be in conflict with the prevailing view of usefulness or justice, in that particular community. Secondly, the custom must be generally followed and regarded as binding in the community. Concerning this point, Sir John Salmond says: "Custom, merely as such, has no legal authority at all; it is legally effective only because and in so far as it is the expression of an underlying principle of right approved by those who use it. When it is based on no such ethical conviction or *opinio necessitatis*—when those who use it hold themselves free to depart from it if they will—it is of no legal significance. The only customs which are a source of law are those which are observed by the community as determining the rights and duties of its members."¹ Thirdly, a general custom must have existed, in English law at least, from immemorial time.² On this point, however, there exists some conflict of opinion, due to the reception of the Law Merchant in English law. Salmond, in the sixth edition of his text-book, states simply that the custom must be well established. In the seventh, however, his opinion has changed somewhat, and he considers the question whether immemorial antiquity is necessary for a general custom, as it undoubtedly is for a particular custom. He refers to two cases, *Crouch v. Credit Foncier of England*³ and *Goodwin v. Robarts*,⁴ the first of which held that immemorial existence was necessary for a general custom, whilst the second held that it was not, but that well-established recent customs of the Law Merchant could become sources of English law. Salmond's own view is that the first case enunciated the correct view, but that exceptionally modern commercial customs have been admitted. Nearly the whole of the Law Merchant, however, says Salmond, has been introduced into English law by "a correct and logical application of the general principle of conventional custom." This latter form of custom will be considered later. The true view, however, seems to be that the Law Merchant is a particular form of custom, affecting the national life to such a degree, and with such generality that it has been accepted as a source of English law without a rigid application of the doctrine of immemorial existence. When the common law first assumed definite shape, commercial operations were

¹ *Jurisprudence*, p. 147.

³ (1873), L.R. 8 Q.B. 374.

² Stephen, *Commentaries*, 18th edn. p. 34.

⁴ (1875), L.R. 10 Ex. 33.

beyond its scope for the most part, yet the needs of society at a later period were such as to necessitate its recognition. "In respect of mercantile custom universality is of far greater importance than immemorial antiquity."¹ The fourth requirement is that the general custom should be in conformity with statute-law. The rules established by the legislature may be taken as the definite commands of the State. Custom consists of rules established more circuitously and with less precision. The latter must, therefore, be in conformity with the former. This rule must be accepted with considerable modifications with respect to Roman law. It will be noticed in the next chapter that some texts in the *Digest* and some modern commentators are agreed that statutes can be abrogated by desuetude, that is, a custom to the contrary, but Savigny and his school go farther, and place statutes and customs upon an equality, so that either may complete, modify, or repeal the other, the later in date prevailing, since it is the more recent product of the national consciousness. The last requirement for a general custom to be a source of law is that it should be in conformity with the common law. This is naturally a more important qualification in countries subject to English law than in countries subject to the Roman law, where the basis of the law is generally a code.

The requirements for a particular custom to be a source of law are somewhat different. They, too, must be reasonable, binding, and not incompatible with the statute-law. It is also essential that the local custom should have existed from immemorial time. The history of this rule in England is a little curious. The Statute of Westminster I. (1275), somewhat accidentally fixed the first year of the reign of Richard I. as the limit of legal memory. This, at first, was a convenient test, but the passage of time has made it more and more unsatisfactory, so that it would now be an impossibility to attempt to prove that a custom had existed continually since 1189. As a result, the usual procedure is for the plaintiff to prove that the custom has existed for a reasonable length of time, and then the defendant, in order to succeed in preventing the operation of the custom, must prove that the custom has not existed for some definite period previously. A particular custom, however, may be inconsistent with the common law; Blackstone declares that this latter will yield to immemorial usage.

A custom, whether particular or general, which fails to fulfil all the required conditions, is not necessarily devoid of legal consequences. Its existence may still be proved as a fact, and in English law this would have an important influence on cases

¹ Stephen, *Commentaries*, 18th edn. i. p. 40.

arising out of the law of contract or dealing with torts of negligence.

Besides general and particular customs there exists a third variety—conventional customs, or usage. A conventional custom is an established rule in some particular sphere of life, or mercantile pursuit, the effect of which is expressly or impliedly to incorporate a term in a contract by the parties concerned, *e.g.* usages of a particular trade or market. The effect of a usage differs from that of a custom. A custom, provided that it fulfils the necessary conditions, is a source of law, either for the whole community or for that territorial section of it in which the custom operates. The effect of a usage, however, is to add a term to the contract, which either expressly or impliedly was entered into with that usage in view. It is obvious, therefore, that the usage can be excluded by a provision in the contract to the contrary. For a usage to operate as a source of law it must be clearly established in the particular section of the community, of which the contracting parties are members. Moreover, no rule may be established in this way which could not be established by express agreement, and when the usage has been judicially noticed it may not be varied by a later conflicting usage.

It has already been noticed that in early times legislation was supplementary to custom. We hear of the laws of the Medes and Persians “which are unalterable,” and of states where the penalty for proposing a new law which was not accepted by the people was death—and whose legal systems remained unaltered for hundreds of years in consequence. To assert that during all that time custom never altered would be ridiculous. To-day all this is changed. Statute-law is the principal source of law in a state; custom only persists where legislation has not as yet penetrated. The reason for this is simple. Legislation, stripped of all divine associations, is really a very convenient method of making law. It is quickly made, definite, easy of access, and easy to prove. Custom, on the other hand, requires centuries to form, is never absolutely clear, and is in consequence more difficult to prove. To repeal a statute it is merely necessary to pass another one, avoiding it. To repeal a custom by desuetude is a long and extremely uncertain business. At what point, for example, may it be said to be no longer binding? Besides, it is always much more convenient to repeal a custom by a statute. It is in consequence of the foregoing considerations that fresh customs are now comparatively rare, while statutes are of almost daily occurrence. Yet custom has one very great advantage over legislation. Since it is made by the people themselves, and not arbitrarily by a legislature, it is extremely improbable that a

custom should be either distasteful to the majority of the members of a state, or even morally bad. Yet, there is nothing to prevent a statute from being both. This consideration, however, is not of much practical importance, since almost all legislatures are now representative in character.

The day of the general custom is now practically over. Many states already possess legal codes, which, if defective, are supplemented by case-law—a source of law quite distinct from custom. In countries subject to English law, partial codification is becoming increasingly frequent. The opportunity of observing a large mass of custom like the Law Merchant being incorporated into state-law will not occur again. For the local custom, which is of very little importance as a source of law, there is probably a longer existence, but in the sphere of English real property law, many local, manorial customs, regulating the incidents of copyhold tenure, have been abolished, with the abolition of copyhold tenure itself, as well as a few other local customs affecting freehold tenure, *e.g.* gavelkind and borough English.

8.—LEGISLATION

LEGISLATION, a binding source of law in all states, and in modern states by far the most important source, is of comparatively recent growth. Speaking generally, we may say that custom precedes legislation, and as society advances, is replaced by it. Sir John Salmond defines it as "that source of law which consists in the declaration of rules by a competent authority." This is not altogether a happy definition, for in spite of the fact that he endeavours to differentiate legislation, in the strict sense, as here considered, from the broader sense of law-making in general, his definition nevertheless does include all methods of law-making, since all legal rules in the last resort are declared by the "competent authority," the judges. Professor Gray defines legislation as "the formal utterances of the legislative organs of the society,"¹ and this seems fully adequate, since the phrases "formal utterances" and "legislative organs" seem to imply, as they are intended to do, a difference in the manner of construction existing between this and other sources of law. Undoubtedly, as Professor Holland notices, "the making of general orders by our Judges . . . is as true legislation as is carried on by the Crown and the estates of the realm on Parliament," but for present purposes it will be convenient to consider only legislation in the sense in which it is commonly understood. In most progressive countries, legislative authority is vested in a body of persons, but this is purely a question of constitutional practice. Generally, too, in modern countries, this power is not limited to that body which is usually known as the legislature. Executive officers frequently possess certain limited powers to legislate. The extent of the authority of the legislature to make laws is also a question of constitutional law. In England it can legislate upon any topic, and the function of the judges is to interpret the words of the statute; but in the United States of America the terms of the constitution limit the legislative authority of Congress, and the Supreme Court may pronounce an Act *ultra vires*, and decline to apply it.

Legislation is usually known as "written" law, all other kinds being unwritten; strictly speaking, we should of course

¹ *Nature and Sources*, p. 145.

term it "the written source of law," but the other is more convenient. It is of two kinds, supreme and subordinate. Supreme legislation is the product of the activities of the sovereign power in a state; subordinate legislation comprises all other kinds. Of this there are four kinds, and a possible fifth. These are Colonial, Executive, Judicial, Municipal, and lastly, Autonomous legislation. Judicial legislation comprises those general rules governing the procedure of the courts which the sovereign power allows them to make and to enforce; they should be distinguished from the rules which the courts formulate through judicial decisions. Autonomous legislation, the debated fifth type, comprises the formal utterances of persons or bodies not forming part of the State's legislative machinery, *e.g.* a university or a railway company. Professor Gray, in his *Nature and Sources of the Law*, experiences a difficulty in accepting autonomous legislation as legislation at all. He differentiates political bodies, to whom is committed legislative authority, from non-political bodies, and then says of the latter: "If we should call the by-laws of a corporation the statutes of the State, because the State, if it saw fit, could prevent their being passed by the stockholders, and because it will open its courts to enforce the observance of them by the members of the corporation, we should have to call every general rule issued by a person whom the State permits to issue it, and which it will regard in its courts, a statute of the State. Thus, a general rule by the head of a household that the children shall go to bed at eight o'clock, or that the cook shall always boil eggs for two minutes and a half, would be a statute of the State."¹ In this case, Professor Gray's favourite method of taking an extreme case and by it reducing a proposition to absurdity fails, for a little earlier, he has mentioned, but not fully considered, the case of a subaltern of infantry commanding a post.² Such a person is as fully a State-organ for law-making purposes as a Secretary of the Treasury, or a Postmaster-General. Now there is no greater absurdity in assuming that the command of the head of a household to boil eggs for two minutes and a half is a statute than in assuming that the command of a subaltern of infantry that regimental boots shall always be blacked inside as well as out is a statute; and surely the by-laws of a railway company are at least as worthy of the title of statutes as the subaltern's commands. There is only one difference between the two types of subordinate legislation—for the by-laws of a city council and of a railway company, and the commands of the subaltern and the head of the household would all require to be proved in court. This difference is that a railway company is not organised for political ends,

¹ *Nature and Sources*, p. 149.

² P. 146.

whilst an executive body is. The whole question, therefore, depends upon this point: Does the fact that a body is organised for private ends and not for the State's deprive the measures which it passes of the quality of legislation, *i.e.* of forming a source of law for the community? It is submitted that it does so deprive them of this character. All other types of subordinate legislation are derived from authority delegated by the State for convenience, to inferior legislative bodies, but there is a continuous chain from the lowest authority to the highest; but in the case of so-called autonomous legislation, the authority has never been *delegated*, it has been *constituted*. To put the matter in another way, if the subaltern did not give general orders to his men, some higher authority or, in the last resort, the legislature itself would usually have to do so. But in the case of a non-political body, if the body itself did not frame by-laws, the State would not, on that account, supply the deficiency, since the by-laws primarily contemplate the well-being of the company, and not the well-being of the State; or, as Professor Gray puts it, "the meeting of the stockholders of an automobile manufacturing company is not an organ of the State to carry out its purposes; it is an organ of the company to carry into effect the objects of the company."¹ The position of public utility companies, however, is an intermediate one. Though they are constituted primarily for private commercial ends, they discharge certain public functions, *e.g.* the regulation of the conduct of those making use of the facilities they offer is committed to them by the State, and to this extent we may say that the State's authority has been delegated to them, and to this extent they make subordinate legislation for the State—but the limits are clearly defined by a charter or statute granted by the State itself. Thus autonomous legislation, in the sense in which Sir John Salmond understands it, is not, properly speaking, statutory law of the State at all, although it is obviously law (*i.e.* a binding rule) within the community which has imposed it.

To sum up, autonomous legislation, in the sense of rules framed by an authority within a state independently of state control, and binding on the courts of that state, does not exist, and probably only existed rarely in mediæval Germany.² In any other sense, it conforms to some other type of subordinate legislation. The characteristic of supreme legislation is that it can be repealed only by the sovereign power vested in the legislature of the State. Subordinate legislation can be repealed by the body which framed it, and by the sovereign power as well. In

¹ *Nature and Sources of the Law*, p. 149.

² See, on this, Gray, *Nature and Sources*, Appendix VI.

order that a statute may become a source of law, continental theory requires four things :

1. It must be passed by the legislature.
2. It must be declared a law in due form.
3. It must be ordered to be published.
4. It must be published.

As a consequence of this last requisite, a statute may sometimes, if the law provides for it, come into operation in different parts of a state at different times. In England, however, a measure becomes a source of law immediately it has passed through all the necessary parliamentary formalities, unless some suspensive clause is included in the statute.

A statute, when passed in due form, is a source of law for the courts of the State to which it extends. It is important to notice, however, that it is not a law of the State, for it still requires to be interpreted and applied ; and thus, although legislation is the most precise source of law which modern states possess, the judges nevertheless exert considerable influence over it through the two functions which they possess in respect of it. This power derived from interpretation was recognised by Justinian who, after compiling his *Corpus Juris*, forbade all commentaries upon it, and directed that all doubtful points should be submitted to him for settlement. This proved to be quite impossible in practice, however, as was also the similar attempt to forbid the judicial interpretation of the Prussian Code of 1794. The action of the judges in interpreting statutes is twofold. In the first place, they must decide upon the exact meaning of what the legislature has actually said, and, in the second place, they must consider what the legislature intended to have said, or ought to have said, but did not, either because it never visualised such a set of circumstances arising, or from some other motive.

The courts of law in all civilised countries, therefore, follow certain rules of interpretation which are fairly plainly defined, and which are briefly as follows :

A judge must, if possible, interpret a statute according to its plain sense, adopting for preference, the ordinary meanings of words for common terms. Exceptionally, however, unusual and technical meanings of words may be adopted, if it is clear that such meanings ought to be read into the statute. Where the law contains an obvious and unmistakable error, the judge must acknowledge and correct it ; finally, where a statute is logically defective, *i.e.* where it is incomplete, inconsistent, or ambiguous, the judge must supplement it.

The operation of judicial interpretation is best studied in

relation to decided cases. A good example of literal interpretation occurs in *R. v. Tolson*.¹ The prisoner was accused of bigamy. She married Tolson on 11th September 1880. He deserted her on 13th December 1881, and she married another man (who knew the full circumstances) on 10th January 1887, having been told that Tolson had perished in a shipwreck. In December 1887, Tolson returned from America. The statute² says: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony," provided that "nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time."

Considering this statute, Willes, J., said: "There is no doubt that under the circumstances, the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past."

Willes, J., was accordingly one of the five judges in the Court for Crown Cases Reserved who construed the statute in its plain and obvious sense, and who, therefore, held the conviction to be right. Nine others, however, held it to be wrong, adopting a more liberal interpretation, and holding that *mens rea* was necessary. Whether this was a correct view or not, it is not necessary to decide. It is sufficient to notice the two types of interpretation accorded to the statute.

Another type of interpretation, made necessary when a legislature does not visualise all possible types of case arising under the statute, which is therefore (even though unavoidably) incomplete, is furnished by *R. v. Negus*.³ Negus was accused of embezzlement, an offence which, according to the terms of 24 and 25 Vict. c. 96, s. 68, can only be committed by a clerk or servant. The question was whether Negus fell within the scope of either of those terms. In fact, he solicited orders on behalf of the prosecutors, on commission, but had no authority to receive money from customers, although any he received must be handed over to the prosecutors. He was not at liberty to receive employment from other firms, although he could solicit orders for the prosecutors at his pleasure. Considering these circumstances, Bovill, C. J., observed:

"Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations

¹ L.R. 23 Q.B.D. 168. ² 24 & 25 Vict. c. 100, s. 57. ³ (1873), L.R.C.C.C.R. 34.

that it is one to be left to the jury, as it is extremely difficult for the Court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to show that the prisoner here was a clerk or a servant. I think that that fact is not sufficiently made out. What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the *orders* of his employer, so as to be under his employer's *control*; and on the case stated there does not seem sufficient to shew that he was subject to the employers' orders, and bound to devote his time as they should direct. Although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control him in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service; but when money is paid by commission a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveller. . . . But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to shew that it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as a servant. The facts before us do not make out what the prosecution was bound to prove, namely, that the prisoner was clerk or servant."

In the case of *Unwin v. Hanson*,¹ Lord Esher observed with regard to technical interpretation: "If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning; though it may differ from the common or ordinary meaning of the words. For instance, the 'waist' or 'skin' are well-known terms as applied to a ship, and nobody would think of their meaning the waist or skin of a person when they are used in an Act of Parliament dealing with ships."

English law furnishes a series of magnificent examples of the logical interpretation of statutes by the judges, extending them to fit cases not originally contemplated by the framers of the

¹ (1891), 2 Q.B., at p. 119.

statutes, in the cases arising out of the Statute of Treasons (1351).¹ In this statute, seven kinds of treason were enumerated. These were :

1. Compassing the death of the King, of his Queen or of their eldest son.
2. Violating the King's consort, the King's eldest daughter unmarried, or the wife of the King's eldest son.
3. Levying war against the King in his realm.
4. Adhering to the King's enemies in his realm, by giving them aid and comfort in the realm or elsewhere.
5. Slaying the Chancellor or the Treasurer or the King's justices when in their places, doing their offices.
- 6 and 7. Counterfeiting the Great Seal, or the Privy Seal, or the coinage of the realm.

This statute is fundamentally feudal in conception, intended to protect the King's person and family, and to preserve the tie of allegiance between the King and his subjects. Thus, an alien, who has never been resident in the realm, can never commit treason. Such a conception of treason, however, proved quite inadequate to meet the changed idea that the State, and its established institutions, are the objects whose safety must be primarily guarded ; but the change from the feudal to the modern conception of treason (*i.e.* from treason to the King to treason to the State) was accomplished, until 1795, purely by judicial interpretation. Discussing the activities of the judges over this statute, Professor Kenny says : " They transformed the feudal conception of treason, as a breach of personal faith, into the modern one, which regards it as ' armed resistance, made on political grounds, to the public order of the realm.' " This new idea they evolved out of Edward III.'s statute by violent interpretations of the language of the 1st and 3rd sections. Thus a compassing of the death of the King was held to be sufficiently evidenced by the overt act of imprisoning him ; because, as Machiavelli had observed, ' between the prisons and the graves of princes the distance is very small.' And an attempt to raise a rebellion against the King's power, in even a remote colony, was similarly held to show a compassing of his death ; though he were thousands of miles away from the scene of all the disturbances. So, again, the overt act of inciting foreigners to invade the kingdom, *i.e.* of compassing the levying of war, an offence which the statute does not mention, was held to constitute an overt act towards compassing the King's death. Similarly, as we have seen, a levying of war against any general

¹ 25 Edw. III. c. 2.

class of the King's subjects was held—by a construction which Hallam pronounces to be ‘repugnant to the understanding of mankind in general and of most lawyers’—to be a levying of war against the King himself; as in the case of riots for the purpose of pulling down all public houses or all enclosures of commons, or of forcing all the employers in a particular trade to raise the rate of wages.”¹

Inconsistencies frequently exist in statutes, having the effect of rendering their true meaning extremely obscure. This fault is commonest in codes (including Justinian's), where a statement in one part may flatly contradict a statement in another. In such cases, the judge must decide which is the true view of the law.

Ambiguity is an exceedingly common fault in statutes. Frequently the legislature, in its efforts to make the statute as comprehensive as possible, leaves it, either purposely or of necessity, vague. Often, again, it has no conception that the question of ambiguity will ever arise. Of such a nature was 29 Vict. c. 19. Section 3 of this Act directed that every Member of Parliament should take the oath in due form. Charles Bradlaugh failed to comply with the provisions of the Act, and the Attorney-General lodged an information in the Queen's Bench Division to recover the statutory penalty. The Court awarded a verdict for the Crown, and Bradlaugh appealed. On behalf of the Crown an objection to the appeal was lodged, on the grounds that the information was a “criminal cause or matter” within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and therefore there could be no appeal to the Court of Appeal. The Crown rested its objection upon the wording of section 5 of 29 Vict. c. 19, which read: “If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of Her Majesty's Superior Courts at Westminster, and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead.” Counsel for the Crown contended that an information filed by the Attorney-General to recover a penalty was a criminal proceeding (1) because, although the penalty imposed by the Act might have been recovered by an action for debt, the

¹ *Outlines of Criminal Law*, p. 272.

offence of which the defendant had been convicted was of a criminal nature. The existence of a civil remedy does not necessarily make the wrongful act civil in character, as some wrongs are both civil and criminal: (2) because the word "action" may include criminal proceedings. The Court took the view that the information was not a "criminal cause or matter" within section 47 of the Judicature Act, 1873, but was a civil proceeding. Brett, M. R., considered the intention of the Oaths Act, as evidenced by sections 3 and 5 of it, at length. "I think," he says, "that the Act of Parliament must be read as a whole, and that the two sections cannot be treated separately; therefore it seems to me the true construction of the Act of Parliament is that it imposes a new obligation not known to the common law, and that with regard to a non-performance of that obligation it enacts a certain consequence. Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence." As a result, in this case the member becomes liable to a penalty, but this is not a criminal proceeding, for "the recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime." Further, the penalty is to be recovered "by action in one of Her Majesty's Superior Courts at Westminster." A criminal information, however, never was moved except in the Court of Queen's Bench. In an action (*Attorney-General v. Radloff*) of a similar nature to the present one, brought in the Court of Exchequer, "two of the judges were of the opinion that unless there was something very peculiar in the Act of Parliament, such as that it in terms enacted that it was to be a criminal matter, the proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney-General was not a criminal proceeding. The other two were of opinion that it was." A decision of the Court of Exchequer is not binding on the Court of Appeal, and as the judges in this case were equally divided, it cannot bind any court. "If I had been a member of the Court at that time, I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding. . . . Reliance is placed on these words: 'He shall for every such offence,' and it is said that the use of the word 'offence' shews that this is considered by the legislature as a crime. What is the offence? The offence is not a refusal to take the oath, it is not a declining to take the oath. What 'offence' means in the statute is a voting or sitting without having

taken or subscribed the oath. It is possible—I do not think it very probable—that at the beginning of a Parliament a member may sit or vote who from forgetfulness or ignorance has not taken the oath. I mean a member who is in every sense capable of taking the oath, but who accidentally, from forgetfulness or ignorance, sits or votes without taking the oath, without having any intention to break the Act, and without having any intention to do anything forbidden by law. I have no doubt that he would be liable to the penalty, for no question of intent is introduced into the Act of Parliament. Now, to my mind, it is contrary to the whole established law of England (unless legislation on the subject has clearly enacted it) to say that a person can be guilty of a crime in England without a wrongful intent—without an attempt to do that which the law has forbidden. . . . An act done without an evil intent must not be considered a crime. . . . I am clearly of opinion that the proceeding under this Act of Parliament by the Attorney-General . . . is in the nature of a civil proceeding.”¹

A statute, of course, ceases to be a source of law after the legislature has passed another statute repealing it, or after the expiry of a certain time, specified in the statute, when it is intended that it shall remain in force for a limited period only. In some systems of law, however, there has existed a theory that statutes may cease to be a source of law through desuetude. It is a much debated point how far this operates, or ever operated, in the Civil Law. A passage from Julianus, incorporated into Justinian's *Digest*,² admits the power (*rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur*), and again, in the *Institutes*, discussing the penalties for injuries under the law of the XII. Tables, Justinian says: “*Sed pœna quidem injuriarum quæ ex lege Duodecim Tabularum introducta est, in desuetudinem abiit*,”³ and there are yet other passages to the same effect, but a rescript of Constantine⁴ denies it. The theory of desuetude has made some impression upon the practice of German law, and considerably more upon the theory of it. In a way, it fits in with Savigny's conception of Law as the product of the national consciousness of the people. If a statute becomes out of date, or obsolete, it is because the people have progressed beyond that stage which has produced the statute, and the national consciousness is now accomplishing its abrogation. The theory has made but little impression upon the Common Law. The preamble of an Act of 1774⁵ admits that certain statutes have

¹ (1885), L.R. 14 Q.B.D. 667.

³ IV. 4. 7.

⁴ Cód. viii. 52 (53). 2.

² *Digest* I. 3. 32.

⁵ 14 Geo. III. c. 58.

become obsolete, and, to avoid doubt, declares them repealed ; but this seems to imply that desuetude never accomplishes complete abrogation, a view which is confirmed by the periodic resurrection of forgotten statutes to meet some particular occurrence with regard to which legislation would be impossible or, at least, undesirable.

Finally, it will be well to notice the difference between public statutes and private statutes. Only the former, which apply to people in general, indicating a course of conduct, are, in strictness, sources of law. Private statutes must be proved in court, even after they have been once judicially noticed, whereas knowledge of public statutes is always assumed.

9.—JUDICIAL PRECEDENTS

JUDICIAL precedents have provoked a good deal of controversy, on account of certain peculiar characteristics which they possess. Bentham attacked them as examples of “dog-law,” *i.e.* as enunciating rules which may only be known to the infringer after a breach has actually occurred. This is a characteristic of which more will be said later. Again, they do not emanate from the popular will, either directly, as custom does, or indirectly, as legislation does, although Savigny regards the judges, in framing decisions, as exercising their authority on behalf of the people, who, on account of the increasing complexity of a legal system, can no longer either frame or authorise judicial decisions for themselves.

Precedents are always more important in a country where there is no code than in a country where there is, and perhaps it is largely as a result of this that precedents have generally been more highly esteemed in England and the United States than on the Continent. They may be regarded as the basis, or the core, of English law. In Germany, too, during the Middle Ages, there was considerable development of case law, but this source, in more recent times, has been allowed to fall largely out of use. Probably this, too, is in no small measure attributable to the revival of interest in Roman law. In the Roman system itself, precedents most certainly were not binding until the time of Augustus, but the right usually known as the *jus respondendi*, conferred upon certain eminent jurists, seems to have made the precedents embodying their replies binding. Justinian himself expressly forbade any “interpretations” of his legislation, judicial or otherwise, and although this regulation proved impossible in practice, precedents were never regarded as binding under the later Empire. In France, judicial decisions are not regarded as binding; the Civil Code again expressly forbids the use of precedents, the idea in this case being obviously the same as Justinian’s—that the code should be the sole authoritative source of law.

The development of case-law in England presents several interesting features. In early times, custom, as a source of law, was much more important. Bracton’s use of cases is by way of illustration merely; the Year-Books collect together cases for

reference and study because they are interesting. Later, they begin to assume a more important rôle. One might almost say that they possess a certain persuasive authority. By the seventeenth century, and the time of Coke, precedents have become fully binding. The following century, and particularly the era of Lord Mansfield and his specially trained juries, may be regarded as the Golden Age of English case-law. At this period, precedent is indubitably the most important source of English law. At the present time, precedents are as fully binding as at any period in their history, but their importance as a source of law has been considerably diminished through the enormous increase in legislation.

Precedents develop the law rather than reform it. Thus the function of case-law is, generally speaking, to fill in the gaps left by the legislature. Case-law cannot abrogate existing law; it can only modify it in some particular. The mode of procedure is to turn questions and matters which were previously of fact into questions and matters of law. Not infrequently such a procedure either leads the law into a corner from which there is no escape except by legislation, as in the famous *Taff Vale Case*,¹ in which the House of Lords held that the funds of a registered Trade Union were liable for the torts of the union officials committed on its behalf—a situation which was only altered by the Trade Disputes Act, 1906,² or else it imposes a series of qualifications upon a rule hitherto clear and general.

An excellent example of the development of a rule by case-law is furnished in English law by the cases dealing with contributory negligence in a tort. The general rule in such cases is that the plea of the contributory negligence of the plaintiff, lodged by the defendant to the action, is a sufficient defence. The first exception to this general principle is usually known as "the rule in *Davies v. Mann*,"³ being a judicial modification of the general principle. Briefly this qualification may be enunciated as follows:

Where damage occurs as the result of the negligence of two persons, and one seeks to sue the other for negligence, that person alone is liable to the other, who had an opportunity (which he did not use) of avoiding the infliction of damage later than that enjoyed by the other.

This rule, however, has in turn been qualified by a further rule, enunciated in the later case of *British Columbia Electric Railway Company v. Loach*.⁴ In this case, the defendant company did not enjoy a last opportunity which it would have possessed, had it

¹ (1901), A.C. 426.

³ 10 M. & W. 546.

² 6 Edw. VII. c. 47, s. 4.

⁴ (1916), 1 A.C. 719.

not been guilty of some earlier negligence, depriving it of this opportunity. Accordingly, when damage resulted, the other party, in actual fact, enjoyed the last opportunity of averting the accident. Nevertheless, the Privy Council held the company liable, apparently on the ground that a last opportunity which a defendant ought to have had, but which he has forgone through his own prior negligence, is equivalent in law, at any rate as far as liability to the plaintiff is concerned, to one which he actually enjoyed. This rule has little appearance of finality. Other combinations of circumstances may easily arise, requiring further developments of the rule.

In considering the importance of case-law in the development of English law, it should not be overlooked that the greater part of the law of contract and tort has been built up exclusively by this means.¹

In view of the preceding consideration of the way in which rules of law are modified by precedent, the question whether the judges make law, or merely declare it, may seem a purely academic one. Nevertheless, the prevailing theory for centuries was that the function of the judges was merely to declare law. Austin summarily dismisses it as a "childish fiction" and certainly it is obvious that legal rules relating to wireless telegraphy or railways did not exist in the time of, say, Henry II., but have been developed as the need arose for them. Nevertheless, so late a jurist as Mr. James C. Carter (some of whose theories Professor Gray energetically refutes) denied law-making power to the judges; the superstition is, therefore, "an unconscionable time a-dying" and deserves a word of explanation. The judges make law, it is true, but their creations take the form of developments of existing rules, and are always in conformity with the general principles underlying the whole body of a nation's law. To this extent the Common Law in England is adequate for all occasions. Additions to it are extensions and developments, not innovations. This fact is not altogether without significance in a consideration of Savigny's view of law, as the product of the *Volksgeist*.

One or two disadvantages of case-law have already been indicated. They have been frequently commented upon, and may be briefly set forth. In the first place, case-law is law made by judges and not by the people. It should be noticed, however, that in the constitutions of all modern states, provisions exist, assuring the impartiality and integrity of the judges on pain of

¹ For a convenient account see Jenks, *Short History of English Law*, chapters x. and xvii. For a detailed consideration, see Holdsworth, *History of English Law*.

removal. The judge must consider the requirements of fair-dealing, even at the expense of popular disapproval. Accordingly the fact remains that case-law is the product of the judges and not of the people. But this is not so much a defect of case-law, as a characteristic of it. Democracy, especially in legal matters, holds no certificate of infallibility, and a law made by a person who has spent his life studying the science of law may be at least as intrinsically just as one made by a body of legislators, mostly ignorant of their country's laws as a whole, and influenced by any considerations except those of abstract justice.

Secondly, case-law cannot reform the law by abolition of unwanted rules. It can only add an increasing number of exceptions to existing rules, thus increasing the complexity of a legal system.

Thirdly, as Bentham objected, case-law is "dog-law," in that the infringer of rule only becomes conscious of his error after the infringement has taken place, and so, in some cases at least, he would enjoy no opportunity whatever of avoiding wrong-doing. This peculiarity depends upon the theory that the judges, in making rules, are merely discovering principles which have always existed in the body of the law—a theory which is only tenable in the limited sense already noticed. Resulting from this peculiarity is the further one that an unexpected decision may occasionally upset proprietary interests of long standing by its retrospective operation.

Lastly, it should be noticed that not everything contained in a judicial decision is in strictness a binding source of law, but only so much as is necessary for the formation of a decision by the judge upon the facts before him (*ratio decidendi*). Any opinions expressed by the judge in addition to this have only the persuasive authority attached to professional opinion, and the value of them will vary with the rank and standing of the judge himself, and the extent to which the opinions expressed harmonise with judicial precedents upon closely related topics. It is, therefore, obvious that judicial precedents as a binding source of law are not so easy to delimit with precision as a statute—more especially as it may be necessary to analyse a whole string of precedents, and to weigh the importance of various decisions, before the law can be correctly stated. Again, there may still remain an element of uncertainty about the law, when this process has been completed, for if the most authoritative precedent is a recent one of the Court of Appeal, it is possible that the House of Lords on some later occasion may reverse it.

Against these defects must be set the fact that case-law, being the product of the daily activities of the law-courts, is more fluid than legislation or custom, and is also more easily and quickly

made. It is also concrete, in the sense that it relates to definite sets of facts upon which a decision must be reached, and contains, therefore, no general enunciation of broad principles, except so far as these may be necessary to the decision. Again, a harmony exists between new precedents and existing law, which is only too frequently lacking in respect of new statutes.

Precedents may be divided into three classes ; those which are absolutely binding, those which are conditionally binding, and those whose authority is persuasive merely. If we consider precedents with respect to the English legal system, we notice that decisions of the House of Lords are absolutely binding upon all courts, including itself ; so that if a case is once decided in the House of Lords in a certain manner, all subsequent similar cases coming before the House of Lords must also be decided in the same manner. Decisions of the Judicial Committee of the Privy Council, which is the supreme court of appeal for the British Empire as a whole, excluding Great Britain and Northern Ireland, are binding upon all inferior courts, but not upon itself, although in practice, the Privy Council will only reverse its own decisions under the most exceptional circumstances. Decisions of the Court of Appeal bind that court, and all inferior courts ; whilst the decisions of lower courts are binding upon all courts lower in rank than themselves.

As a general rule, the decisions of all courts of co-ordinate jurisdiction are conditionally binding. A conditional precedent will be followed unless there exists some strong reason indicating that such a course would not be desirable (*e.g.* where there is reason for supposing that the precedent does not contain the true law upon some particular topic). Conditional precedents acquire increased authority with the lapse of time, and as other decisions follow them, so that they ultimately obtain almost binding authority.

Precedents possessing only a persuasive authority are followed because the court thinks that they truly enunciate the law upon the point in dispute ; there is no obligation upon the court to follow them. Examples of precedents with such persuasive authority are decisions of courts of inferior rank or with separate jurisdictions. Thus the decisions of the Privy Council, although they are entitled to be considered with the greatest respect on account of the eminence of that court, and the reputation of the judges who compose it, have only persuasive authority in any English court. Similarly, decisions of courts of other parts of the British Empire, although not possessing the same weight as those of the Judicial Committee of the Privy Council, have some persuasive authority.

10.—RELIGION

BOTH Sir Henry Maine and Sir James Frazer agree that the religious fear of evil, enforced by a priestly order, is the principal instrument in securing uniformity of conduct in primitive society, at a period when law cannot be said to enjoy any independent existence. Eventually, out of certain ceremonial observances develop collections of secular rules enforced by physical sanctions, rather than punishments dependent, at bottom, upon the necessity of appeasing the wrath of some supernatural being. This process is traced in most interesting fashion, with regard to the Decalogue, by Sir James Frazer in *Folk-Lore in the Old Testament*. One phase indeed, of the progress of society, centres around the separation of law and religion. The Jews, for example, regarded their laws as Divine in origin, and in consequence their administration was never freed from priestly control. In Roman Law, too, *jus* is at first inextricably mixed with *fas*, and for a time, the pontiffs administer both. In the East, the Laws of Manu, or Hindu Law, and the Mohammedan Law are alike believed to be Divinely inspired. A certain difference may be observed between those societies in which law became separated from religion at a comparatively early stage in their development, and those in which law and religion did not become so separated. The law of the first group of societies pursues what may be regarded as a normal course of development, whilst in the second group, development is continually thwarted, and even arrested altogether through the influence of religion. This is particularly the case when the law of a community has been codified before the cleavage between law and religion has taken place (*e.g.* the Laws of Manu).

We may reasonably suppose that the law of Western Europe would be greatly different both in form and content, if there had never existed a Christian religion and theology. Christianity borrowed the Jewish conception of the omnipotence of a single Divinity, and adapted it for political ends. It preserved at once the Imperial tradition and the substance of Roman Law (in the shape of the Canon Law) during the period of European disintegration. When stability was restored to the European system, the Papacy existed side by side with the Empire as a political force of the first rank. In addition to this, or rather,

as a consequence of it, ecclesiastical courts, administering Canon Law, and independent of the secular authority, existed side by side with the lay-courts, in every kingdom and principality of Christendom. For several centuries, a triangular contest occurred in Europe. On the one hand, there was the struggle for supremacy between the Empire and the Papacy; and on the other, there was the unceasing attempt of the princes of Europe to be independent of both. Ultimately, the victory was with the princes, and in every independent political unit, there continued, as an aftermath of the earlier and greater struggle, a contest between the secular courts, supported by the supreme political power in the State, and the Church Courts, backed by the waning power of the Papacy. Only one end to the contest was possible; after it was concluded, the Austinian theory of sovereignty was equally inevitable. As a result of all these dissensions, religion, in Western systems, ceased to be an independent binding source of law, enforced in special tribunals, and was compelled to accept a subsidiary position. Many rules elaborated by the Canon Law were accepted into the national systems of Western Europe, sometimes by express legislation, but more frequently by means of judicial precedents. Thus, the Canon Law merely became one of the materials employed by a judge to build up a new precedent. It is in this sense, that the statement arises that "Christianity is part of the Law of England."¹ Moreover, even at the present day, if statute, precedent, and custom are silent upon the question to be decided, the judge may allow rules of Christianity to influence him in arriving at his decision, but he is in no way compelled to accept such rules as limiting his freedom of action; and the judge may in no circumstances employ such a rule if it conflicts with a statute, precedent, or custom. Thus, religion, in Western systems of law at least, is now of persuasive authority merely.

In the East, religion survived as a binding source of law practically to the present time. Thus, in countries of Mohammedan civilisation, the Koran was the basis of all legal principles, and laws inconsistent with its precepts were void. Even in these countries, however, a fundamental change has recently occurred. In Turkey, for example, the law of the Koran has been replaced by a copy of the French Code, and religion has been relegated to the position it occupies in Western States.

¹ For a consideration of the present application of this statement, see *Bowman v. The Secular Society* (1917), A.C. 406.

II.—PROFESSIONAL OPINION

PROFESSIONAL opinion is a source of law, of persuasive authority merely. It may be divided into the following classes :

1. Obiter dicta of judges,
2. General opinions of the legal profession,
3. The opinions of writers upon legal subjects.

Savigny, as the spokesman of the historical school, has an explanation of professional opinion as a source of law, reconciling it with his theory of law as a product of the popular consciousness. He says : “ There is formed a special order of persons skilled in law who, an actual part of the people, in the order of thought represent the whole. The law is, in the particular consciousness of the order, merely a continuation and special unfolding of the folk-law. It leads henceforth a double life ; in outline it continues to live in the common consciousness of the people, the minute development and handling of it is the special calling of the order of jurists.”¹ To paraphrase these observations of Savigny, we may say that the continued development of a legal system makes a legal profession necessary, and this, when formed, is entitled to have its opinions held specially worthy of consideration.

Obiter dicta have already been mentioned. They are statements of law made by a judge in the course of a decision, arising naturally out of the circumstances of the case, but not necessary for the decision. The value of such dicta as sources of law naturally varies a good deal, either according to the reputation of the judge making them, or according to their relation to the rest of the law upon the specific topic in question, or upon similar topics.

The legal profession comprises three groups of persons, the judges, the practising lawyers, and the teachers of law. The English division of the second class into barristers, who represent clients in court, and solicitors, who instruct barristers, and who appear in the minor courts only, is accidental and does not find its counterpart in other systems. Together, these three branches of the legal profession exercise a powerful influence upon the development of law. Their importance is best exemplified in

¹ *System des Heutigen Römischen Rechts*, para. 14.

the Roman system. Throughout its history, the persons who administered it were not necessarily skilled in law. The great magistracies—even pro-consulates and prætorships—were the rewards of political services, and a magistrate usually consulted some eminent jurist before authorising any changes in the various edicts. The *judices* in Rome were merely ordinary citizens, chosen almost at random to decide the disputed matter. Accordingly the practice early arose of submitting specific questions of law, drawn from the case at issue, to some jurist for his opinion. Of course, there was no limit to the number of jurists to which a *judex* could submit questions for opinions, and there was equally no obligation upon the *judex* to follow such opinions when given. Nevertheless the opinions of men devoting their lives to the study of the law would naturally influence the decisions of a layman very greatly—particularly as a *judex*, under the Roman system, was held legally responsible for the decisions he made. By the end of the Republic, the opinions of certain eminent jurists were generally, but unofficially, held to be binding upon the *judex*. Augustus went a step further by granting the *jus respondendi* to various jurists, with the political motive of securing their adherence to the new régime. The effect of conferring this right is a little doubtful for the first century of the Empire. Most probably the *jus respondendi* was at first merely an official recognition of eminence, but certainly by the time of Hadrian, the *responsa* of every jurist possessing the right were held to be binding upon the *judex*. The *jus respondendi* ceased to be given about the time of Diocletian (A.D. 284–305), but existing *responsa* were still treated as authoritative sources of law.

A further source of law in Rome was the decisions of juriconsults in cases propounded to them by students of law. Sir Henry Maine declares this to be the cause of the existence of that wealth of principles which characterises the Roman system. Certainly the ingenuity of the students in constructing imaginary cases was equalled only by the industry and erudition of the jurists in answering them, and Roman law owes much of its symmetry and completeness to this source of law.

In English law, professional opinion is less direct in operation, but is nevertheless considerable. English judges are not trained separately, as is generally the case on the continent, but are chosen from the ranks of the Bar and the teachers of Law. Frequently, therefore, their decisions reflect rather the opinions of their order than of themselves. Further, many existing rules of law owe their origin to the support of the legal profession; and many projected alterations in the law owe their abandonment to the same source.

Dr. Goadby, in his *Introduction to the Study of Law* notices that professional opinion has also considerably influenced the development of the Mohammedan system, and quotes Syed Amir Aly as follows: "The four principal schools of law among the Sunnis, named after their founders, originated with certain great jurists, to whom has been assigned the distinguished position of Mujahid Imams, namely, Expounders of Law *par excellence*. By virtue of their learning and their eminence, they were entitled not to be bound in the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy."¹

The third division of professional opinion comprises the opinions of the writers of text-books. In most systems of law this is at once considerable and apparent. A supreme example of its influence may be observed in the growth of international law. Owing to the peculiar structure of that science, its rules have frequently depended in no small degree upon the opinions of jurists; and it should always be remembered that international law in its present form would have been impossible, except for the labours and genius of Grotius. Generally speaking, the influence of the writers of text-books has been much greater in Roman law, and the systems derived from it, than in English law. In Rome, during the later Republic and the early Empire, law and Jurisprudence were the supreme studies for the educated Roman. In consequence, many of the greatest minds of the age were attracted to the study of law, and the prestige which the science enjoyed was correspondingly great. Under these circumstances the writers of legal text-books moulded educated public opinion, indicating the changes and developments which seemed desirable to them. Each legal text-book itself enjoyed almost binding authority, although its importance naturally varied according to the reputation of its author. The line of great jurists extends unbrokenly to the end of the third century. Modestinus is the latest jurist of the first rank, whose works are quoted in the *Digest*; after him, lawyers were content merely to recapitulate what had gone before. The writings of certain jurists, however, continued to enjoy almost statutory authority, particularly those of Gaius, Ulpian, Paul, Papinian, and Modestinus.² At length, in A.D. 426 we have the celebrated Law of Citations, recognising that the opinions of these five jurists ought

¹ P. 123, citing Syed Amir Aly, *Mohammedan Law*, i. 13.

² "By the time of Diocletian, the *jus respondendi* seems to have ceased to be given, and, gradually, all the writings of the great jurists of the earlier years of the Empire came to be considered as authorities, without any distinction being made between their *responsa* and their treatises. It was as if Judge Story's judgments and treatises were to be considered of like weight" (Gray, *Nature and Sources of the Law*, Sect. 427).

to prevail in any law-suit. Where the authorities differed, the opinion of the majority should be followed, but where the numbers on each side were equal, that side should prevail which had the support of Papinian. If he were silent, and the authorities equally divided, the judge was free to choose.¹ Finally, in the reign of Justinian, the whole of the classical legal literature was reduced to the form of a Digest, modifications being introduced through "interpolations," where changes in the law rendered them necessary. The importance of the *Digest* as a source of law for the whole of modern Europe may be in some part gathered from the two considerations, (1) that the *Corpus Juris* is the starting-point for modern European law and Jurisprudence, and (2) that of the four elements which compose the *Corpus Juris*, the *Institutes* and the *Digest* are incomparably more important than the Code and the Novels. Again, in mediæval and modern Europe, the writings of great jurists have not only proved a most important source of law, but, in some cases, they have actually decided what system of law should prevail in a particular country. In Italy, the labours of the Glossators and, to a lesser degree, the Commentators, created the Pandect law which ultimately triumphed in that country; similarly, the German Civilians brought about a reception of the Pandects in Germany, whilst almost in our own day, the revolt of supporters of Germanic law in Germany against a proposed code which was substantially Roman, has resulted in the adoption (in the year 1900) of a Code which, although it owes much both to Roman and Germanic origins, nevertheless, possesses a marked individuality of its own.

English law also possesses its succession of eminent jurists, who have expounded and influenced the law in their own particular fashion. Not a few of these have also been great lawyers as well. Our earliest writer of the first rank, Bracton (d. 1268), was a Justice of Assize in the south-western counties for nearly twenty years, and from 1249 to 1259 "he was a member of what we may with some accuracy call the King's Bench Division of the High Court of Justice."² Littleton and Fitzherbert, in Lancastrian times, were both Justices of the Common Pleas, while the writings and dignities of Coke (1552-1633) are too well known to require more than a passing notice. Blackstone (1723-1780) whose *Commentaries* still form one of the starting-points for any investigation into English law, combined the function of judge with those of text-book writer and University Professor. He was the first teacher of the Common Law in the Universities, being likewise the first holder of the Vinerian Professorship of English law at

¹ Codex Theodosianus, i. 4. 3.

² Maitland, *Bracton and Azo*, Introduction, p. xi.

Oxford. Generally speaking, the writings of eminent jurists acquire increasing weight with the passage of time. The opinions of Bracton, Littleton, and Coke are probably as binding, at the present day, upon a court of law as a judicial precedent, but the authority of writers later than Blackstone is persuasive merely.¹ Exceptionally only may the writings of a jurist be considered as authoritative during his lifetime. The late Professor Dicey, Anson, Chitty, and (in America) Mr. Justice Story, are among the select few who have achieved this distinction.

The conservatism of English law in refusing to admit the authority of a text-book writer until his works have adequately satisfied the test of time is justified when we remember that the writer is essentially a theorist, rather than a practising lawyer, at the time of writing, and in consequence he is subject to certain influences arising out of that situation. In the first place, he is apt to state his rules too broadly. He is always eager to discover general principles and tendencies underlying his science; the modern literature of Roman law, especially, contains works written purely from the standpoint of some particular theory, and the evidence has been "interpreted," twisted, and even forgotten altogether, in order to preserve that theory. Again, a text-book writer has not the same responsibility as a judge, whose

¹ Dr. Jenks in his *Short History of English Law* has the following valuable paragraph upon the authority of legal text-books in England: "It is sometimes said that, even so late as the period now under discussion, the text-books of certain very eminent writers have been treated as authorities by English Courts, and should therefore be regarded as sources of modern English law. But this is true only in a modified sense. Doubtless such works as Blackstone's *Commentaries*, Dalton's *Country Justice*, and Hawkins' *Pleas of the Crown*, may be fairly treated by the historian as statements, *prima facie* correct, of the law at the time when they were written. It may even be that, having regard to the great reputation of such writers, English judges will allow advocates to quote from them, and will even themselves, in delivering judgments, allude with respect and approval to these works. But it cannot be seriously contended, that these works are authorities in the sense in which Bracton, Littleton, and even Coke, are authorities for the law of their respective periods. The difference between the weightiest passage of a modern text-book writer and the most ordinary judgment of a Court of First Instance, or an unimportant section of an Act of Parliament, is quite clear. The advocate may show that the passage in question is inconsistent with statute or judicial decision; and, if he succeeds, its so-called 'authority' is at once gone. He may attempt to show the unwisdom, absurdity, or inconsistency, of the judicial decision, or the section of the Act of Parliament; but, until these have been overruled by a later statute, or (in the case of the judicial decision) by a superior tribunal, they remain binding *in pari materia*, and, even if the advocate is not pulled up for irrelevance, his argument will be of no avail. Even Blackstone, one of the greatest of text-book writers, admits freely the truth of this view. Text-book writers, whatever they once were, are now guides only, and not authorities for English Law" (p. 198).

decisions, in the form of reasoned judgments, are composed with an actual case before him, reminding him of the fact that the rights of definite individuals will be affected by his decisions, and further, that his decisions form a link in a chain of precedents vitally affecting human existence in that particular community, in general. This gives judicial decisions a more cautious character than the writings of jurists. Indeed, largely on account of their remoteness from the general trend of human affairs, there have been jurists advocating the direst penalties and the most severe constructions of the laws of some systems, when they themselves were among the most peaceful and benevolent of mankind in their personal relations. The doctrines of ruthlessness, based on state necessity, put forward by some writers upon international law during the nineteenth century and the opening years of the twentieth gave some colour of legal justification to the perpetration of some of the most reprehensible acts of recent warfare.

12.—OTHER SOURCES : DECISIONS OF FOREIGN COURTS, EQUITY, AND AGREEMENT

I. THE DECISIONS OF FOREIGN COURTS OF JUSTICE

THE nature and operation of judicial decisions or precedents in general has already been explained when considering the third source of law. The only matter remaining to be discussed, therefore, is the operation of foreign precedents in any system of law.

Generally speaking, certain precedents (*e.g.* of superior courts) in a legal system are regarded as binding upon the courts of that community. Other precedents (*e.g.* of courts of co-ordinate jurisdiction) are persuasive merely. Thus, in England, a judge of the Court of Appeal must follow the precedents of the House of Lords in making his decisions. But he is under no obligation to follow the precedents of the Supreme Court of the United States, or even to attempt to reconcile those precedents with those of the House of Lords. On the other hand, if there existed no statute, custom, or precedent in English Law, dealing with the particular matter at issue, the judge is entitled to remember a decision of the Supreme Court of the United States, if that court has dealt with the topic, and he is also entitled to allow that precedent to influence his own decision. In this way, decisions of the superior courts in the United States are frequently quoted with approval in English courts and *vice versa*. Naturally, the extent to which the judge allows himself to be influenced by foreign decisions varies considerably. The Judicial Committee of the Privy Council is the final Court of Appeal for the British colonies and dominions. It is also largely composed of judges who are likewise members of the House of Lords, and who make up that body in its judicial aspect. Decisions of either court, therefore, are treated with the greatest respect in the other court. Similarly, as has been indicated, the decisions of superior courts of other parts of the British Empire influence decisions in English courts, but not so greatly as decisions of the Judicial Committee of the Privy Council. Secondly, decisions of the chief courts of the United States exercise a similar influence; and, lastly, in default of precedents from any of these legal systems,

cases derived from Roman law, or from systems based upon it, occasionally have some practical application.

II. THE PRINCIPLES OF MORALITY OR EQUITY

On every case which comes before him, it is necessary for the judge to reach some definite conclusion, although all the recognised sources of law are silent. Even the prevalent religion in that particular state may give no clear indication of the course which ought to be adopted. In such a case, the judge must decide the issue according to its merits, and in doing so, he will usually be guided by the principles of morality, equity, or fair-dealing, current in that community, as reflected in his own intelligence. Even where a binding source exists, his method of applying it will be regulated to some extent by moral principles. In most communities, such moral principles will have their origin in some system of religion, although centuries of development may have made the two distinct, and in some cases, it may even be that moral rules conflict with religious ceremonial. Thus, it is possible that the moral principles relating to divorce in England are slowly changing, and that this change is being slowly reflected in English law—but there has been no change in the attitude of the Christian religion towards divorce, so that if an issue involving divorce, and not covered by any statute, precedent, or custom, arose, it might be necessary for the judge to choose between the rule furnished by religion, and that arising from the present system of positive morality in England; but the authority of ethics is persuasive only.

The moral outlook of a community progresses as the community itself progresses, and an educated person at the present time will indignantly repudiate as unworthy, views which were accepted without question a generation or two ago. Thus the principles underlying a system of law require periodic revision if the law is to keep pace with the moral growth of the people. It is manifestly impossible to accomplish this revision by legislation alone, although something is done by this means. But the bulk of the work may be achieved by the views upon morality held by the judges, and which it is sometimes open to them to apply. Thus it is that we find both in Roman and in English law a system of equity developing side by side with the ordinary law, and the Prætors and Chancellors adjudicating according to principles consistent with the moral ideas of the latest age, whereas the ordinary law is based upon moral rules of a former one.

The growth of a system of equity in Roman and English law has already been mentioned. It will be sufficient to notice here that

rules of equity may themselves become as inequitable as ordinary rules of law, with the passage of time, so that a new tempering of law with equity becomes necessary ; and, lastly, we may inquire what is the test of morality or equity. What object do we seek to achieve in promulgating "equitable" or "moral" rules, over and above the strict law ?

Almost universally in early times, and in some communities until quite recently, the rules of morality have been derived from religion, and no separation between the two was considered possible. With some peoples, however, and notably among the Greeks, religion was held to be an insufficient source of moral rules ; indeed, the gods themselves were sometimes represented as "immoral" in their dealings with other gods and men, not only according to the moral standards of the present age, but according to those of the Greeks as well. Greek philosophers, therefore, supplied the missing moral ideal by evolving the conception of a Law of Nature, based on reason. This Law of Nature indicated the object of human law—that it should attempt to conform to an ideal standard, deducible from the dictates of Nature, through the reasoning faculty with which the human species is endowed. The same conception also influenced the development of Roman law. Here again, the object of "moral" or equitable rules in a system of law, was to bring that system in closer conformity with Reason's perfect law. In the Middle Ages, a fusion takes place between religion and Reason. The Law of God is perfect, therefore it is that ideal law which human reason elaborates, *i.e.* the Law of Nature. Therefore, those equitable principles which should modify human law are derivable equally from Divine ordinance, or from Reason. In more modern times, legal philosophy has to a considerable extent freed itself from both the natural and the religious bases of morality. Most of the English juristic literature (and, to a lesser degree, that of other countries, too) shows the influence of the Theory of Utility. Austin says : "When we say that a human law is good or bad, or is what it ought to be, or what it ought not to be, we mean (unless we intimate our mere liking or aversion) that the law agrees with or differs from a something to which we tacitly refer it, as to a measure, or test. For example, to the adherent of the theory of utility, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For, in *his* opinion, it is consonant or not consonant with the law of God, inasmuch as it is consonant or not with the principle of general utility. To the adherent of the hypothesis of a moral sense, a human law is good if he likes it he knows not why, and a human law is bad if he hates it he knows not wherefore. For, in *his*

opinion, that his inexplicable feeling of liking or aversion shows that the human law pleases or offends the Deity.”¹ He then proceeds to explain that an atheist applies the test of utility to *human*, and not to Divine law, since he does not believe in the latter; whilst “to the believer in a supposed revelation, a human law is good or bad as it agrees with or differs from the terms wherein the revelation is expressed.” Continuing, the author then declares:

“In short, the goodness or badness of a human law is a phrase of relative and varying import. A law which is good to one man is bad to another, in case they tacitly refer to the different and adverse tests.

“The Divine laws may be styled good, in the sense in which the atheist may apply the epithet to human. We may style them good, or worthy of praise, inasmuch as they agree with utility considered as an ultimate test. And this is the only meaning with which we can apply the epithet to the laws of God. Unless we refer them to utility considered as an ultimate test, we have no test by which we can try them. To say that they are good because they are set by the Deity, is to say that they are good as measured or tried by themselves. But to say this is to talk absurdly: for every object which is measured, or every object which is brought to a test, is compared with a given object other than itself. If the laws set by the Deity were not generally useful, or if they did not promote the general happiness of his creatures, or if their great Author were not wise and benevolent, they would not be good or worthy of praise, but were devilish and worthy of execration.”²

Bentham defines the principle of utility as follows: “By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.”³ The connection between this definition and the theory of “the greatest happiness of the greatest number,” held by the English Liberal Party last century, is obvious.

The Socialistic and Individualistic theories in vogue at the present time affect morals and law as well as politics. According to the first theory, rules of morality should contemplate the good of the State, viewed as an organised whole. Thus, the anti-social man is also immoral. On the other hand, the Individualistic theory, as applied to morals, implies that the greatest good may

¹ *The Austinian Theory of Law*, Jethro Brown, p. 36.

² *Ibid.* p. 37.

³ *Principles of Morals and Legislation*, p. 2.

be attained through the fullest development of the individual in such a way that his development does not interfere with that of other people; or, as Herbert Spencer puts it, "Every man is free to do that which he wills, provided that he infringes not the equal freedom of any other man." At present, in most modern states, the second theory predominates. If the other were universally adopted, its influence upon law, through the application of the principle where there was no other source of law, would be soon apparent.

III. AGREEMENT

Sir John Salmond, in considering the sources of law, enumerates agreement, giving rise to "conventional law."¹ Unfortunately, however, he omits to explain this source of law more fully than by remarking: "That an agreement operates as a source of rights is a fact too familiar to require illustration."² This is, of course, perfectly true, but it does not prove that agreement is a source of law. A will is a source of rights, but that does not mean that every will which receives probate is a source of law. It will be sufficient, therefore, to demonstrate what Sir John Salmond implies when he says that agreement is a source of law to the State. If A and B agree together, for ends generally designated by the law as "lawful,"³ the courts of the State will recognise the agreement, and enforce its terms between A and B. Similarly, if C and D agree together, the courts will recognise the agreement, and enforce its provisions between C and D. But this action affects only the parties to the agreement themselves.⁴ When the agreement terminates, both parties will be free agents again, and the agreement will no longer be recognised by the courts as existing between them. Now a law is essentially a rule of conduct, or as Austin says, it obliges persons to a course of conduct. Generality is a test of a law. But no generality is implied in an agreement between two persons to buy a horse; nor will the terms of some specific agreement to buy a horse be retained by the courts for them to apply in other cases of agreements to buy horses, where no terms have been agreed upon, unless such an agreement to buy a horse can be

¹ *Jurisprudence*, Salmond, p. 119.

² *Ibid.* p. 124.

³ A significant term, which indicates that no agreement will be recognised or enforced by the State unless it is in accordance with the law.

⁴ It is true that third parties are bound to respect agreements which are contracts, so that they may not attempt to induce parties to them to break them; but this is a rule of law, and has no connection with the agreements beyond the fact that they are the objects contemplated by the rule of law.

construed to be within the usage of some particular trade or profession, when the usage might become an implied term in the contract—but this has already been considered when dealing with custom. Thus, an agreement is recognised so long as it exists, but when it is dissolved, it has no further consequences. Agreements play a very important part in international law. But the text-books repeat again and again the maxim that an agreement between State A and State B binds them but cannot bind State C, who is not a party to it, *i.e.* an agreement is not a source of international law. But when many states become parties to the agreement, or make other similar agreements between themselves, it is generally admitted that a rule of international law may result from it, so that possibly State X who is not a party to any such agreement may be regarded as bound by it. But this is not a consequence of any one agreement, or of a number of similar agreements. It is a consequence of the fact that these agreements have caused a custom to originate and grow, so that the custom thus born is a source of international law. Thus, custom is a source of international law, but agreement never is so; agreement is merely a source of custom, and only then if a number of other agreements exist compelling uniformity of conduct in the states who are parties to them. The process in municipal law is exactly the same. A number of agreements concluded in the same way, and enforcing similar courses of conduct in the parties to them may cause a custom to grow. But it is the custom, and not the agreement which is always the source of law.

13.—THE FORMS OF LAW

THE distinction between the sources and the forms of law is the distinction between the material of which the law is made up, and the shape it assumes when brought before the notice of the judge for application to some particular case. Formerly, the distinction was not altogether unconnected with the tribunal in which the law was administered. Thus in England, before the Judicature Acts, legal rules in the form of Equity were administered in the Court of Chancery, whilst legal rules in the form of Common Law were administered in the Common Law Courts. It must be acknowledged, however, that this division according to forms as applied to the tribunals in which the law was administered was never pursued to its logical conclusion, for there have never existed in England courts administering statute law alone, others administering common law alone, and so on, although in the Middle Ages, one form of law, the Canon Law, was administered in the ecclesiastical courts, and a portion of another form—customary law—was administered solely in the manorial courts. Moreover, the Law Merchant was administered for several centuries in mercantile courts not directly amenable to royal control.

By the forms of law, therefore, is meant the different shapes which the law assumes when taken from its sources, and brought before the judges for application. In a modern community, the only usual forms of law are legislation, judicial decisions, custom, and equity. In Rome, there was a further shape which the law might assume—the opinions of certain specified jurists. In the present chapter, the nature of these forms will be analysed, and their advantages and defects considered, with the object of answering the question, to what extent the particular form, considered rightly, expresses the needs of the community in the sphere of law.

In communities where political institutions have not attained the complexity characteristic of the modern state, the chief shape or form in which the law is found is custom. As Sir Henry Maine points out,¹ there is still an earlier stage of society where the only form in which law exists is the pronouncement of the kings ; and there is also the stage, in a theocratic society, in which

¹ *Ancient Law*, chapter i.

the priest claims to reveal divine law to the community through arbitrary pronouncements, but in both these stages law is scarcely sufficiently clearly distinguished from allied conceptions to permit detailed analysis. Customary law, however, predominates at the threshold of social history. The Romans were ruled by it before the XII. Tables, and the Greeks before the composition of their codes.

Custom as a form of law, has been clothed with peculiar sanctity at various periods of legal history. Probably in the early days this was due to some supposed divine origin of the substance which appeared in the form of a custom. In recent juristic speculation, however, custom has been regarded as a direct emanation from the popular will, and as such, of at least equal validity with legislation. Notwithstanding this, the fact remains that custom is a somewhat unsatisfactory form for the law to assume. It is uncertain in origin—it may be due to a casual selection between alternative courses of conduct—and indefinite in scope. Moreover, as the only form of law within the community, it substitutes the legal rules of earlier generations for those of the living members within a community. Again, since knowledge of it reposes in theory within the minds of the members of the community, it lends itself to interpretation in the interests of a particular section within the State, as was the case in Rome before the publication of the XII. Tables. For this reason, in practically all political societies this form of law has been replaced by others.

In Western societies, at least, a definitely new stage of development seems to have begun when law in the form of custom is replaced by law in the form of legislation. It is true, that in many cases the code is little more than a formal enunciation of pre-existing customs, but at least it is precise and certain. For some time after the promulgation of the code, however, there seems to be little conception that the new form of law is far more easily changed than the older one. Thus, the XII. Tables are regarded as final. Theoretically, they are the sole source of legal principles in Rome for many centuries. So, in England, the Anglo-Saxon codes inaugurate no era of law-making. It is only in very recent times that all law, wherever possible, is put into the form of a statute. Previously the formal pronouncements of the legislative organs of a society are regarded as only properly invoked to settle some issue of unusual importance. Less vital matters are settled by legal rules in other forms.

Notwithstanding this hesitation to employ a more efficient form, the true nature of legislation seems to have been comprehended in early times. In Greece, statutes were passed by the

citizens as a body. In Rome, the decemvirs were appointed, as were all other officers of state, by popular election, and later statutes were passed in the various assemblies of the people. Thus legislation appears as a solemn act of the people as a whole. Following the disruption of the Roman Empire, the conception of the popular origin of legislation seems to have temporarily vanished, but legislation itself has practically disappeared also, and custom again rules. The Emperors and Kings of the Dark Ages levy taxes and suppress disaffection. Their legislative pronouncements are few. So it is with Asiatic conquerors, of whom Maine remarks that the most powerful of them probably never promulgated a law in the modern sense in his life. In the feudal stage of society which emerges, the authority of the king's laws extends directly only over his tenants-in-chief, and when the kings attempt to make their authority, legislative and executive, more general, there is a resultant attempt on the part of the community to ensure that its requirements shall be reflected in the royal legislation. In England, this was ensured by the growth of Parliament. Abroad the victory is not always with the people. In France, concentration of legislative, as well as executive, power in the hands of the sovereign illustrated at once how powerful was the instrument of legislation, and how dangerous it was to entrust its exercise to a single individual.

In the nineteenth and twentieth centuries, the representative assembly, as the vehicle through which the wishes of the people have been embodied in legislation, has incurred considerable criticism, and attempts have been made to secure greater harmony between popular desire and legislation. These attempts have resulted in the introduction of the Referendum and the Initiative into the process of legislation. The former exists in Switzerland, in Australia for constitutional amendments, and in some states of the United States of America. Where it exists, laws approved by the legislatures must be submitted to the electorate for ratification. The Initiative as yet only exists in some of the Western States of the United States. Where it operates, measures may be proposed by a section of the community, for the approval of the electorate. If passed, they become law. The idea behind both processes is simply that the community as a whole ought to exercise greater influence over the process of legislation than it does at present in states where these devices do not exist, but it is plain that, since every elector neither knows, nor can be expected to know, the law in its complex modern form, only comparatively simple issues can be dealt with in this way with profit.

It is clear, however, that legislation, as a form of law, may

not always be the result of the same processes. It may be, but rarely is, the arbitrary command of a despot; it may be the product of a governing council (as was the case in England between the Norman Conquest and the establishment of Parliament); again, it may be the result of the deliberations of one or more representative assemblies, with or without popular approval in a Referendum; or of the deliberations of the people as a whole, as was the case in Rome and Greece. Lastly, it may be the product of an expressed desire by one section of the electorate, ratified by a majority of votes cast by the electorate.

There remains for consideration the topic of codification. Where a complete code of law for a community is prepared, this represents an attempt to cast the whole law into a single mould. Justinian, it has been noticed, attempted to exclude the possibility of other forms of law, by excluding judicial and other comment on the code. Codes, however, may exclude all other forms of law than judicial decisions, but the latter, owing to the nature of the judicial function, can never be entirely abolished as a form of law. The advantages of codification are those of legislation. When legislation, as a form of law, was regarded as a final statement of the law, there was a danger that legal development would be arrested by codification—a danger which in Rome was only averted by centuries of progressive interpretation of the XII. Tables. In modern times, however, when codes may be amended with facility, the advantages of definiteness and certainty greatly outweigh the danger of legal conservatism.

Another form in which law appears is equitable rules. This form, in modern English law, is practically indistinguishable from another form—judicial precedents—being shaped in the same manner by the King's judges. Formerly it was otherwise. The Common Law Judges administered the common law, and the Lord Chancellor, with his assistants, administered Equity by methods differing from those regulating the application of the Common Law. For several centuries it was found more expedient to introduce new rules into English law in this form than in the form of legislation.¹ The rule was formed by the Lord Chancellor in the Court of Chancery. The source was "equity," or the moral conceptions and standards of fair dealing current at the period, as reflected in the mind of the Chancellor. Later, when the rules of Equity became more fully developed, the source was simply to be found in principles laid down in the earlier decisions of the court. The great superiority of this form over the Common Law in the early days is to be found in its flexibility, rendering it especially sensitive to the needs of the people.

¹ On this, see Jenks, *Short History of English Law*, chapter xiv.

Eventually, however, this form became as rigid as the one which it had replaced, and to a large extent Equity ceased to be the vehicle through which newer and better rules were introduced into English law, this latter result being effected in the nineteenth century through the more frequent use of another form—legislation. The employment of the two forms of law—Common Law and Equity—has resulted in a curious dualism in rights and duties in English law, more especially in the sphere of real property.

In Rome, where Equity also existed as a distinct form, the method of establishing it was different. The Prætor, in his edict, enunciated changes in the law, and the edict was, therefore, the form in which the rule came before the judge in deciding a case. When the edict was consolidated by Julianus in the reign of Hadrian, it ceased to be a distinct form of the law, as did the rules of equity in England after the Judicature Acts.¹ In both Rome and England, Equity is a form established by the sovereign in response to a generally-expressed wish on the part of his subjects to see some newer, more comprehensive, and more efficient form of law introduced into the State.

The last general form which law assumes is the judicial precedent. The nature of this form has been considered when judicial precedents were discussed as sources of law. It remains to notice that precedents as a form of law are peculiar to English law and its derivatives. Roman law never developed precedents as a separate form.

In Roman law, however, law might also assume the form of a reply by a jurist to a legal problem addressed to him by a judge, provided that the jurist possessed the *jus respondendi*. Law in this form seems peculiar to Rome. Its origin was almost accidental. Many have conjectured that it was due to the desire of Augustus to attach lawyers to the Imperial régime. Whether this is true or not, the fact remains that the opinions given bound the judge, and so were a distinct form. A later and allied form is the written word, as set down by five text-book writers—Gaius, Papinian, Ulpian, Paul, and Modestinus—and by other text-book writers cited by them, to which statutory force was given by Valentinian's Law of Citations in A.D. 426. So jealous was the legislator to preserve the form of the original works to which authority was thus given, that the notes of Paul and Ulpian on Papinian were ordered to be disregarded, and concerning the earlier writings cited by the five it is provided that their texts are to be verified by collation of manuscripts.

A form of law which no longer exists in modern systems of

¹ "Equity" is none the less still a *Source* of English law.

Western law is ecclesiastical law, which, like Equity in England, was formerly administered by a tribunal distinct from the Common Law tribunals, according to different rules. Unlike Equity, however, legal rules in this form had their *source* in principles established beyond the jurisdiction of the King of England, being derived from Papal decrees and decisions of ecclesiastical synods. At the present time, however, ecclesiastical law no longer appears as a distinct form in English law, having through centuries of judicial application been transformed into another form—judicial precedent.

It must be noticed that it is a characteristic of a certain stage in the development of a legal system that the form in which any particular law is framed is considered to be more important than its substance. Thus Gaius¹ relates that under the *legis actio* system in Roman law, a man who sued another for cutting his vines, calling them vines, when the XII. Tables prescribed the word “trees,” lost his action. It is therefore apparent that the precise form in which any particular rule is cast, was formerly more important than it is now, although the manner in which any particular rule is framed is still a question of considerable importance for the judge. Again, one particular form of the law may not be recognised by judges administering law in another form—as was the position of equitable rules in Common Law Courts before the middle of the nineteenth century. Since the Judicature Acts, however, all forms of law have been administered in all divisions of the English High Court.

¹ *Institutes*, iv. 11.

14.—THE ENFORCEMENT OF LAW

IT has already been shown that in the early patriarchal stage of society, law consists in the commands of the *paterfamilias*, enforced, most probably, through the veneration of those subject to his rule prompting obedience, and reinforced, perhaps, by brute force. In the more developed stage of the patriarchal era, when the clan enjoys an organic unity, rules within the clan are enforced through the authority of the elders, each *paterfamilias* enforcing obedience upon wrong-doers within the household. Outside the clan, the vendetta and self-help still prevail. If a member of clan A steals goods from a member of clan B, and is detected, then the member of clan B will retake his goods, and no doubt beat the wrong-doer, if he is able, into the bargain. In cases of serious physical injury and murder, however, clan B will swear a blood-feud upon clan A, and every member of one clan will be the sworn enemy of the members of the other. Of this stage in the history of Law, there exists the most widespread evidence, from the Scottish and Irish clan feuds to the recent vendettas of Corsica and the Balkans, from the wars of the ancient Roman *gentes* and the blood-feuds of ancient Greece to the clan-wars of the Chinese.

It is in this clash of conflicting interests that the newly-born and delicate organisation of the State, resting upon the federation of many clans, must attempt to exert its authority. This is not an easy task, and the State's first activity is to regulate inter-clan remedies rather than to supersede them. As far as the blood-feud is concerned, the State directs its energies towards limiting clan-vengeance to the person of the wrong-doer himself. Thus, we get eventually the *lex talionis*. For the loss of a life, the murderer must forfeit his ; for the breaking of a limb, one of the limbs of the wrong-doer must in turn be broken. This idea is sometimes carried by the infant state to extreme lengths. In the code of Hammurabi it is provided that if a builder constructs a house which falls down upon the inhabitants, killing the master of the house, the builder must himself lose his life ; but if the son of the master of the house is killed, then the son of the builder must lose his life ; and similarly with a daughter. On the other hand, in Jewish law, the rigour of the *lex talionis* was somewhat mitigated by the establishment of the cities of refuge.

In the matter of self-help, we find interesting transitional provisions in Rome at the period of the XII. Tables and afterwards. By the XII. Tables it is provided that a thief caught in the act is to be enslaved, and the goods restored. But if the thief is not identified until later, the goods must be restored, but the thief need only pay twice the value of the goods to the owner by way of compensation. Here the intention is clearly to go as far as possible towards gratifying the feelings of the captor of a manifest thief, compatible with the preservation of any authority at all by the State. In the case of the non-manifest thief, however, the impulse of the owner to take the law into his own hands on discovery is deemed to be less strong than in the case of manifest theft, and he is accordingly unable to gratify his desire for vengeance upon the wrong-doer, as he would in the event of his apprehending the thief in the act. On the other hand, he is offered a pecuniary inducement to recognise the jurisdiction of the State.

Still a further step forward has been made when the State can induce the kindred of the victim of a murder to recognise that the murder of their tribesman may be atoned by the payment of money by the slayer. The enforcement of this payment, together with the assessment of the value of the deceased, is undertaken by the State. Eventually we get elaborate lists of tariffs incorporated into law-codes, the amount payable varying with the rank both of the slayer and of the slain. Such lists appear in some Anglo-Saxon Codes. In the event of the criminal proving unable to pay the sum assessed, he forfeits his life ; but this time, not as the victim of clan-vengeance, but at the command of the State. Whether he pays or whether he loses his life, his responsibility is no longer decided by the arbitrary decision of the clan of the victim, but by the verdict of a tribunal established by the State's authority.

The proper enforcement of law within a state is closely associated with the character and integrity of its judicial officers. To a very considerable extent, the prosperity of a community depends upon the manner in which the judges administer the law. Impartiality is unquestionably the most important requirement. The administration of law by the Roman pontiffs before the XII. Tables was resented by the bulk of the community, because it was notoriously an administration in the interests of the patrician order ; and domestic discord was inevitable until the publication of the XII. Tables greatly curtailed the function of the pontiffs.

Other countries could furnish similar examples from the period in which the only law was the decree of the judge. Curious

examples of partiality are to be found in Icelandic saga. In primitive Iceland, the law was known only to one or two wise elders, who might, indeed, be termed the repositories of the law, since it was handed down from one elder to another. The validity of an action, and hence the success of a suit, depended completely upon the accuracy with which the litigant pleaded in his form of action. The aim of every party to an action, therefore, was to secure exclusive possession of the legal formula appropriate to the case—to wrest it from the unfortunate elder and to prevent him from communicating it to the opposing party.

Again, the stability of social life in England during the Middle Ages, and the absence of serious internal disturbances, as compared with the Continent, may be due, in no small measure, to the able and disinterested administration of justice in the King's Courts. It is true, that the royal officials accepted fees—but their scales were not weighted in favour of any particular class. On the Continent, however, the continued importance of the feudal courts seems to have advanced the interests of the feudal seigneur at the expense of those of his tenants. Finally, it should be noticed that the subservience of the judges to the Crown in the reign of the first two Stuarts produced a feeling of insecurity, which was only removed when the Civil War and the Revolution of 1688 had ensured security of their terms of office to the judges, immune alike from pressure on the part of the Crown and from popular clamour. That this last can operate just as inimically to the welfare of the community as pressure from above, the late Viscount Bryce sufficiently demonstrated with regard to the United States.¹

One further point with regard to the enforcement of law must be noticed, more particularly in relation to criminal law. In order that wrong-doing may be reduced to a minimum, the potential law-breaker must be made to realise clearly that his offence will almost certainly meet with fitting punishment. Unreasoning harshness is of no avail, since it leads the wrong-doer directly to the commission of more serious crimes in order to escape the consequences of others, with the knowledge that, if apprehended, he will suffer only the same penalty. Hence the proverb, "It is as well to be hung for a sheep as a lamb." Certainty of punishment, however, deters all but the most resolute law-breakers—a proposition which is sufficiently evidenced by a comparison of the statistics relating to homicides in England with those relating to homicides in the United States.

¹ See *Modern Democracies*, vol. ii. chap. xliii., "The Judiciary and Civil Order."

PART II

FUNDAMENTAL JURISTIC CONCEPTIONS

15.—RIGHTS AND DUTIES

IN considering the nature of Law, it was noticed that in most European languages, the ideas of "Law," "Right," and "a right" were all denoted by the same word, a different term being employed for the conception "a law." This has led to a certain amount of confusion in continental thought, although the Germans have attempted to get out of the difficulty by distinguishing *objectives recht* (law or Right) from *subjectives recht* (a right).

Right and "a right" are conceptions peculiar to societies which have already taken some steps in the march of human progress. A society in which the delimitation of each man's interests depended only upon the strength of his arm would be a society in a state of anarchy. Thus, historically, might, *i.e.* the exercise of the individual will in defiance of public opinion, precedes right. The whole theory of Right and "a right" in relation to society presupposes some exterior approbation—perhaps of a god or of society as a whole—of the enjoyment of an interest.

It is obvious when we use the phrase "a legal right" that the word "legal" qualifies "right," and thus implies that there may be rights other than legal ones. It is equally clear that, in the general mind, a right is closely connected with an interest. It is thus necessary to distinguish legal from other rights, and to investigate the relation between a right and an interest. A right has been defined by Professor Holland (following Austin) in the following terms :

"When a man is said to have a right to do anything, or to be treated in a particular manner, what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular way, with approbation, or at least with acquiescence ; but would reprobate the conduct of any one who would prevent him from doing the act or make use of the thing, or should fail to treat him in this particular way."¹

This definition seems open to two objections. In the first

¹ *Jurisprudence*, 13th edn. p. 83.

place, it seems to relate more particularly to moral rights than to rights in general—for a legal right may be enforced in the face of public opinion, which thus hardly seems a necessary element in all rights. It is true that the State regards the exercise of such a legal right at least with acquiescence, but to identify the State with public opinion seems fundamentally wrong. Again, it seems desirable to add to Professor Holland's definition that the mind of the man himself is directed in some degree towards his performance of the act contemplated, otherwise it would not be incorrect to say that a murderer had a right to be hanged.

A right, therefore, may be defined as the enjoyment of the interest which some individual or collection of individuals has in the performance of some act, or in some forbearance, either of himself or others, based upon some factor other than the brute force of that individual or collection of individuals to perform or compel the performance of that act or forbearance, towards the accomplishment of which the individual or collection of individuals has directed his or their mind.

Of rights there are various types, only some of which require notice here. A moral right is an interest appertaining to an individual, and in conformity with some standard of conduct which that individual recognises as properly limiting his freedom of action in the achievement of moral happiness or well-being. It is frequently confused with the entirely different conception of a social right, *i.e.* an interest enjoyed by an individual with public approval or acquiescence. For example, a Roman Catholic may have a social (as well as a legal) right to divorce his wife, but since his moral code forbids the dissolution of marriage in this manner, he has no moral right to divorce her.

Finally, there are legal rights, *i.e.* the product of the recognition and protection of interests by law. The only legal rights are those which are recognised and protected in this way.

A legal right may be enforced in five different ways. The commonest method is to assess the injury suffered by the owner of the right as a result of infringement and award that amount as compensation, or *damages*. Sometimes it occurs, however, that damages, no matter how heavy, would be an inadequate remedy, as where the owner of a unique picture is deprived of it unlawfully. Here the Courts will go further and award *restitution*; or an individual may enter into a contract to sell something unique, or to do or refrain from doing some act of an exceptional nature. Here the Courts may decree *specific performance* of the contract. These two may be classed together. Thirdly, and exceptionally, the State may allow the person whose right has been infringed to recover from the wrong-doer a sum in excess

of the value of the infringement of his right, by way of *penalty*. Again, there may be occasions when, in order to obtain full security for the enjoyment of an interest, it is necessary to secure from the actual or threatened infringer, either as an addition or an alternative to damages, some guarantee that the offender will not infringe the right in the future. In such a case, he is accordingly made subject to an *injunction*. Lastly, where private interests have been violated, and the security or prosperity of the State is involved, the State itself will act through its administrative officers, in respect of the offender. This procedure is termed *punishment*, and it may be the sole remedy, or it may be an auxiliary to others, enjoyed either by the State or by private individuals. Indeed, none of the remedies provided by the State necessarily excludes the others.

A legal right is not necessarily enforceable at all. Thus, if A owes B money, B has a right to have that money paid to him ; but, according to English law, B cannot enforce his right, if six years have elapsed from the time of the loan, and if during that period B has not sought to enforce his right, and A has not acknowledged it in any way. Nevertheless, the right still exists in law, though no longer directly enforceable. This is illustrated by the fact that if, after six years, A pays B, he cannot afterwards recover the money. Such a right is known as an imperfect right, and besides the consequence just noticed, has the following additional effects :

1. It is sufficient to support any security given for it ; so that a mortgage remains good, even though the debt is statute-barred through lapse of time.

2. Where a right is imperfect through the absence of some required form at the time of its creation, if the defective form is subsequently remedied, the right becomes perfect.

The term “ enforceable ” calls for some comment. Its usual significance is that a person may compel others to respect his interest. But of the remedies noticed above, only the injunction, which can forbid the threatened invasion of a right, arises before the right itself has been infringed, when the original right is replaced by another right in respect of it—a right to satisfaction for the infringement. What we really mean is that the knowledge that the State will exact certain penalties for infringing a right, deters persons in general from infringing it, so indirectly making it enforceable.

The infringement of a right is always a wrong, *i.e.* an infraction of legal standards of fair dealing. It is also the breach of a duty. Thus we arrive at the fact that right and duty are correlatives. When we speak of a right, it indicates that we are

looking at the legal protection of an interest from the standpoint of the person whose interest is the subject of the law's activity. When we speak of a duty, we are looking at the protection of an interest from the standpoint of those who must refrain from interference with the interest. A duty is, therefore, an act or forbearance compelled by the State in respect of a right vested in another, and the breach of which is a wrong.

It will thus be noticed that according to this definition, every right implies a correlative duty, and *vice versa*. Austin held, however, that there were certain duties, which he termed *absolute* duties, in respect of which there existed no correlative rights. He says :

"A duty is absolute in any of the following cases : first, where it is commanded that the acts shall be done or forborne towards or in respect of the party to whom the command is directed. Secondly, where it is commanded that the acts shall be done or forborne towards or in respect of parties other than the obliged, but who are not *determinate* persons, physical or fictitious. For example, towards members generally of the given independent society ; or towards mankind at large. Thirdly, where the duty imposed is not a duty towards *man* ; or where the acts and forbearances commanded by the sovereign, are not to be done or observed towards a *person* or *persons*. Fourthly, where the duty is merely to be observed towards the sovereign imposing it ; *i.e.* the monarch, or the sovereign number in its collegiate and sovereign capacity.

"I think that this enumeration completely exhausts the cases wherein duties or obligations can be considered absolute."¹

This view has not been generally followed, and it is necessary to examine each of these types of duty in order. Austin states that there can be no relative duty towards oneself, but he might have gone further and pointed out that there can be no *legal* duty at all towards oneself. He instances the duty not to commit suicide, but here, though the individual is clearly subject to a legal duty, there is a correlative right vested in the State, which has an interest in the lives of its members. Under Austin's second head, however, are duties to indeterminate persons, being either members of a state as a whole or mankind at large. Duties owed to the State, however, correspond to rights vested in the State. Thus, in any criminal prosecution, the State is enforcing its own right against the offender. There remains for consideration whether indeterminate persons, apart from the State, may be held to own rights. It must first be noted, however, that Professor Holland, discussing the same point, speaks of "persons inde-

¹ *Jurisprudence*, i. p. 401.

finitely." This phrase is not synonymous with "indeterminate persons." The difference must now be noticed. "Persons indefinitely" are those concerning whose existence and identity we are quite certain, but whose numbers we do not know. "Indeterminate persons," on the other hand, are those concerning whose existence and identity we are uncertain, but whose numbers, if discovered, may not be uncertain. Concerning indeterminate persons, therefore, we may say that, although they are undiscovered, yet if they may at some future time be discovered, so becoming determinate persons, they are capable of possessing rights. If they can never become determinate, they are not capable of possessing rights; but, at the same time, there are no duties in respect of such persons; for it is impossible to do, or to refrain from doing, acts or forbearances in respect of persons whose identity we shall never know, and concerning whose existence we are ignorant, except by the merest accident, when such acts or forbearances would have no legal value. Where a duty is not towards a man, it must necessarily be towards God or the lower animals. Duties owed to God, however, are not legal duties, since they are not recognised and enforced as such by any modern system of law, whilst the duties which exist in respect of the lower animals (*e.g.* laws prohibiting cruelty to them) have correlative rights vested in the State, whose interest is in the moral welfare of its members—a welfare which would be imperilled by the gratification of the desire to inflict suffering in this way. Lastly, there is the question whether a right may properly be said to be vested in the State. It has already been pointed out that in criminal prosecutions, the State is enforcing its own rights. Austin, however, held that because a sovereign or state enforces rights, it therefore could not enjoy rights itself, since a right is an interest protected by law, the creature of the sovereign, whilst the sovereign himself, in his own actions, is irresponsible. But a state may choose to recognise its own interests through the law, and whilst it does so the result of that legal protection is a right.

It is therefore submitted that rights and duties are always correlative, and that there is no such thing as an absolute duty.

Every right is made up of certain elements. These are four in number. There must be a person in whom the right is vested, or, more shortly, a person of inherence; there must also be a person against whom the right prevails, and who is therefore subject to the corresponding duty. This is the person of incidence. Thirdly, there must be some act or forbearance, obligatory upon the person bound; and there must also be (fourthly) something to which the act or forbearance relates. The requisites for legal personality, sufficient to sustain legal rights and duties, will be

considered in a later chapter. Similarly, a consideration of acts and forbearances is postponed, to permit certain allied conceptions to be investigated. There remains only, therefore, the term "things" for discussion.

Austin defined things as "such permanent objects, not being persons, as are sensible or perceptible through the senses."¹ In this sense, it must be admitted at once that there are many rights which include no thing or object. Actually, however, Austin has only defined material things, whilst the science of Jurisprudence adopts a broader definition, and includes within the meaning of the term thing any enduring source of amelioration in an individual's material position, actual or potential. Thus, a man's health and liberty, equally with his goods, are things.

The Romans exercised great ingenuity in their classification of things. Thus, Gaius² mentions things subject to divine dominion and things subject to human dominion, things sacred and things religious, things public and things private, and many other divisions. It is sufficient for the purposes of modern Jurisprudence, however, to note the following divisions :

1. *Material* things, or things in the Austinian sense; and *incorporeal* things, *i.e.* intellectual or artificial things. In this class we may include rights and duties themselves. Thus, a copyright is an incorporeal thing, and the *hereditas*, a thing in Roman law, conferred on the heir not only rights, but also duties.

2. Things *immoveable*, *i.e.* land and things permanently attached to it; and things *moveable*, *i.e.* all others.

3. Things *in commercio*, *i.e.* capable of being privately owned; and things *extra commercium*, *i.e.* not capable of being privately owned.

4. Things *fungible*, *i.e.* a thing which may be exactly replaced by another of the same species (*e.g.* money); and things *non-fungible*, *i.e.* one which may not be exactly replaced. This division has important consequences in the law of contract. If money is lent, it is not necessary to return precisely the coins borrowed; any others, which amount to the full extent of the debt may be returned instead.

¹ *Jurisprudence*, i. p. 358.

² *Institutes*, ii. 1-14.

16.—THE CLOSER ANALYSIS OF RIGHTS

IN the course of his discussion of rights generally, Sir John Salmond observes that in addition to rights in the strict sense, the correlatives of which are duties, there is also a wider and a laxer sense, in which the term right is used to mean "any legal recognised interest, whether it corresponds to a legal duty or not." Of this type of rights he notices at least three distinct kinds, which are capable of classification as :

1. Rights in the strict sense,
2. Liberties, and
3. Powers.

To correspond with these (he declares) there is no generic term to include all the burdens imposed by law, but three kinds can be distinguished :

1. Duties (in the strict sense), implying absence of liberty.
2. Disabilities, implying absence of powers.
3. Liabilities, implying the obligation to respect a liberty or a power vested in another.

These observations open out a whole field of juristic investigation which was explored with some thoroughness by the late Wesley Newcomb Hohfeld, formerly Southmayd Professor of Law in Yale University. The results of his analysis were included in a little volume entitled *Fundamental Juristic Conceptions*. He points out that the complex legal interests of modern life, *e.g.* trusts, options, escrows, "future interests," "corporate interests," etc., cannot be satisfactorily included within the terms *right* and *duty*, and further, that these interests exhibit perceptible differences among themselves. Accordingly, in order to eliminate some of this ambiguity, Professor Hohfeld arranged the fundamental legal relations in the following scheme of jural opposites and jural correlatives :

JURAL OPPOSITES }	right no right	privilege duty	power disability	immunity liability
JURAL CORRELATIVES }	right duty	privilege no right	power liability	immunity disability

In attempting to define a right in the strict sense, Professor Hohfeld takes it to be the correlative of a duty, so that it is best explained as a claim. Thus, if X has a right against Y that Y shall stay off X's land, then Y is under a duty to stay off. Thus right and duty are correlatives. On the other hand, although X has a right or claim against Y that Y shall stay off his land, X himself has the privilege of entering upon his own land, *i.e.* he is under *no duty* to stay off himself. Thus a duty is the opposite of a privilege, but the correlative of a right. Incidentally, these two examples have demonstrated the fact that the so-called right of ownership of land contains at least two separable elements—and there are others in addition. Sir John Salmond uses the term liberty to express the same idea as privilege:

“Just as my legal rights (in the strict sense) are the benefits which I derive from legal duties imposed upon other persons, so my legal liberties are the benefits which I derive from the absence of legal duties imposed upon myself. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone. It is clear that the term right is often used in the wide sense to include such liberty. I have a right (that is to say, I am at liberty) to do as I please with my own; but I have no right and am not at liberty to interfere with what is another's. I have a right to express my opinions on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right to defend myself against violence, but I have no right to take revenge upon him who has injured me.”

In each of these examples, Sir John Salmond says that he has a privilege of doing as he pleases with his own, etc., but has no right to interfere with what is another's, etc.: Thus Sir John Salmond is looking at the same thing from two different points of view:

X may do as he likes with his own (a liberty or privilege).	WHILST	other people have no right to interfere with X while he does as he pleases with his own (correlative no-right).
Other people may do as they like with their own (a liberty or privilege).	WHILST	X has no right to interfere with other people while they do as they like with their own (correlative no-right).

From these examples we get the fact that a liberty or privilege is the correlative of a no-right. Professor Hohfeld puts this

still more clearly by reverting to X's right that Y shall stay off his land. The correlative of X's right is Y's duty not to enter. The correlative of X's privilege of entering himself is Y's no-right that X shall not enter. The correlative of Y's privilege of entering himself is X's no-right that Y shall not enter. Thus we get the following diagram :



In the above, the brackets indicate correlatives, and the lines opposites. From this it is clear that the opposite of a right is the absence of right, or no-right, and the opposite of a privilege is a duty. The opposites become logically justified when we observe that X's privilege of entering relates primarily to his own act, as does also Y's duty of not entering, whilst X's right that Y shall not enter, places him in immediate contact with Y (and is, indeed, incomprehensible without Y), and Y's no-right that X shall not enter similarly places him in immediate contact with X and is incomprehensible without X.

Turning now to the second group of jural opposites and jural correlatives, Professor Hohfeld employs the term "power" to denote a person's ability to do something. He points out that a change in a legal relation may be the consequence of a fact or group of facts not under human control, or the consequence of a fact or group of facts which is subject to human control. In the second case, the person whose will, resulting in a displacement of external nature, may bring about the change, is said to have the power to do the act considered. Thus, a person has the power to abandon his entire legal interest in his personal property, or he has the power to invest another with it. Other examples are, powers of appointment and rights (or preferably powers) of entry. Agency involves, amongst other things, the investment of the agent with powers derived from the principal, *e.g.* the power to dispose of the principal's property, and the power to bind the principal by contract.¹ Sir John Salmond divides powers into public and private and then remarks that "power is either ability to determine the legal relations of other people, or ability to determine one's own. The first of these powers—over other persons—is commonly called authority; the second power—over oneself—is usually termed capacity." Professor Hohfeld, however, dislikes the term authority, as ambiguous, and defines capacity as "a particular group of operative facts, and not a legal relation of any kind."² The first

¹ *Fundamental Legal Conceptions*, pp. 50-2.

² *Ibid.* pp. 51-2.

part of Sir John Salmond's statement may therefore be accepted, but not the second, if Hohfeld's classification is to be entirely followed.

The opposite of ability is disability, and therefore, the opposite of a power is obviously a disability. The correlative of a power is a liability. This will be more readily appreciated by reference to the following example: A makes an offer to sell Whiteacre to B by post. At any particular moment within reasonable time B may exercise the *power*, which he possesses in consequence of the offer, by accepting it. B then has a *right* to purchase Whiteacre, and A is under a *duty* to sell it. But before B's acceptance of the offer, A was subject to a *liability* to sell it. Now the opposite to such a liability to sell would obviously be a *non-liability* to sell, or, as it is usually termed, an *immunity* from selling. An immunity from selling thus corresponds to a *disability* to buy, or more shortly, immunity and disability are correlative. Lastly, from the foregoing observation it is obvious that *immunity* and *liability* are jural opposites. These four conceptions may be conveniently contrasted in the following example:

A has offered to sell Whiteacre to B (an offer which has not been accepted), while B owns Blackacre which he has not offered to sell A. This may be analysed as follows:

$\left\{ \begin{array}{l} \text{B's power} \\ \text{(with respect to Whiteacre)} \\ \\ \text{A's liability} \\ \text{(with respect to Whiteacre)} \end{array} \right.$	X	$\left\{ \begin{array}{l} \text{B's immunity} \\ \text{(with respect to Blackacre)} \\ \\ \text{A's disability} \\ \text{(with respect to Blackacre)} \end{array} \right.$

In this, A's liability may be contrasted with B's immunity, and B's power with A's disability. Sir John Salmond notices a good example of an immunity in the "right" of a peer to be tried by his peers, which "is neither a right in the strict sense, nor a liberty, nor a power. It is an exemption from trial by jury—an immunity from the power of the ordinary Criminal Courts." In this summary at the end of Chapter X., he gives a convenient method of distinguishing the ideas contained in the four types of legal interest in the following table:

1. Rights (*strictu sensu*)—what others *must* do for me.
2. Liberties—what I *may* do for myself.
3. Powers—what I *can* do as against others.

To which we may add:

4. Immunities—what others *may not* do as against me.

Although it is quite possible that even this classification is not completely exhaustive, the analysis of legal relations into these terms will do something towards clarifying juristic thought.¹

¹ Whilst the value of Hohfeld's method of analysis has been fairly generally admitted, there has been very little discussion of his "juristic conceptions" in England. In 1925, however, Mr. H. J. Randall discussed them in *The Law Quarterly Review* (vol. xli. pp. 86-94), and suggested certain amendments to Hohfeld's table of opposites and correlatives. The original table has been retained in the present chapter, but the student is referred to Mr. Randall's valuable criticisms, which may assist him to appreciate the value of Hohfeld's analysis.

17.—THE CLASSIFICATION OF RIGHTS

RIGHTS may be classified in a great number of ways. It will be sufficient, however, to consider briefly the following methods of classification :

1. Perfect and Imperfect Rights.
2. Legal and Equitable Rights.
3. Positive and Negative Rights.
4. Rights *in Rem* and Rights *in Personam*.
5. Proprietary and Personal Rights.
6. Rights *in Re Propria* and Rights *in Re Aliena*.
7. Public and Private Rights.
8. Principal and Accessory Rights.
9. Primary, Sanctioning, and Resultant Rights.

1. PERFECT AND IMPERFECT RIGHTS

The nature of an imperfect right has already been discussed. The best example is that of a statute-barred debt. Others are rights arising out of contracts which lack some essential required by law, *e.g.* writing, under the Statute of Frauds, 1677, and the Sale of Goods Act, 1893. Another type of imperfect right is a claim in respect of foreign land, this being enforceable only in the courts of the State within whose territory the land is situated. Again, claims against foreign states and sovereigns are imperfect rights from the standpoint of municipal law.

All other legal rights are perfect.

2. LEGAL AND EQUITABLE RIGHTS

The distinction between law and Equity (understanding by the latter a system of rules which endeavours to bring the strict law into closer relation with moral sentiments of a community, at a time when the strict law has proved incapable itself of so doing) has already been pointed out in preceding chapters. In this section, it will be sufficient to notice that this dualism in the

legal system of a state, gives rise to two classes of rights—those recognised by the strict law, and those recognised solely by Equity. Thus, in Roman law, the Civil Law would recognise the right of agnates only to succeed to the property of one who had died intestate; the Prætor, however, through the equitable jurisdiction which he exercised, would admit other classes of persons who were, generally speaking, of the type known as cognates. This he effected by allowing the bare title of *heres* to the nearest agnate, at the same time granting *bonorum possessio* to the person whom the Edict recognised as being equitably entitled. Similarly, in English law, the strict law, when dealing with trusts, would insist upon the legal ownership of the trustee, disregarding the rights of the person in whose interest the trust was created altogether, but here again, the Chancellor stepped in, and by virtue of his equitable jurisdiction, compelled the trustee to execute the trust according to its terms.

Both Roman law and English law at length attained a stage of development, in which the law was revised and put on a new basis, so that law and Equity became supplementary instead of being antagonistic, or contrasted. In Roman law this end was finally attained by the codification of the law accomplished by Justinian. In English law the same object was accomplished by the Judicature Act, 1873, as a result of which, law and Equity, though still distinct, became available to the litigant in any division of the High Court of Justice, instead of, as formerly, being only available separately in distinct courts.

Notwithstanding these changes, however, there has been no fusion of law and Equity in England, and the two types of rights are therefore still distinct, the following differences remaining between them:

(1) Whilst legal rights may be enforced either by legal or equitable remedies, or by both, equitable rights may only be enforced by equitable remedies; for the common law has never enforced a purely equitable right.

(2) Whilst legal rights are enforceable automatically on proof of their existence, equitable rights are enforceable only at the discretion of the court.

(3) Legal rights, once proved, are enforceable by all persons, against all persons. Equitable rights, however, can only be claimed by certain classes of persons (*e.g.* those “whose consciences are clear,” to use the phrase of equity), and cannot be enforced against a legal owner whose conscience is clear. As far as the second part of this rule is concerned, the principle is that where legal and equitable rights conflict, and the equities are equal, the legal right will prevail.

3. POSITIVE AND NEGATIVE RIGHTS

A positive right corresponds to a positive duty, and a negative right to a negative duty. A positive duty is one in consequence of which the person bound by it is compelled to perform some positive act in favour of the person in whom the right resides. So, if the person bound infringes the right, it is by omission to do something; and it therefore follows, that the infringement of a positive right, by the breach of a positive duty, is a negative wrong. Similarly, a person bound by a negative duty is under an obligation to refrain from doing some act. If he is guilty of a breach of this negative duty, it is by performing an act. The infringement of a negative right, by the breach of a negative duty, is therefore a positive wrong. Ordinarily, the law is content to direct persons to refrain from performing wrongful acts, rather than to direct them to perform acts worthy of praise or reward. Accordingly, therefore, the majority of rights conferred, and duties imposed, by law are negative. Rights arising out of contract, however, are frequently positive.

4. RIGHTS "IN REM" AND RIGHTS "IN PERSONAM"

The frequent division of rights is derived from Roman law, which considered *jura in rem* as rights available against all mankind, enforceable by *actiones in rem*, and *jura in personam* (or *obligationes*) as rights available only against specific persons, and enforceable by *actiones in personam*. All rights *in rem*, it should be noticed, are negative, since it is impossible to impose the necessity to perform positive acts in favour of an individual upon the community at large.

The term "right is *rem*" had aroused considerable criticism. A right *in rem* is not necessarily a real right, *i.e.* a right to real property. The right to immunity from defamation is a real right. Again, Austin notices that "the phrase *in personam* is an elliptical or abridged expression for *in personam certam sive determinatum*,"¹ and if this were always remembered, it would possibly assist in destroying the too-common fallacy that a right *in rem* is a right against a thing. Professor Hohfeld, in considering the same point, suggests the abandonment of the two terms altogether, and offers as substitutes the terms *multital* and *paucital* rights, for rights *in rem* and rights *in personam*; ² but this suggestion has not been generally adopted.

Austin, considering a right *in rem*, observes "the phrase *in*

¹ *Jurisprudence*, i. p. 369.

² *Fundamental Legal Conceptions*, p. 74.

rem denotes the *compass* and not the *subject* of the right. It denotes that the right in question avails against persons generally, and *not* that the right in question is a right over a thing.”¹

5. PROPRIETARY AND PERSONAL RIGHTS

According to this method of classifying rights, a man's property is contrasted with his person, or, alternatively, his *estate* is placed in opposition to his *status*. It must not be supposed, however, that a man's *status* consists entirely in rights. The aggregate of a person's proprietary rights certainly constitutes his *estate*; but a man's *status* is the aggregate of his personal rights and *duties*. Thus, rights to land, houses, and securities are proprietary, and form part of his *estate*; while rights to freedom and citizenship, and also those resulting from his position as a husband or a father, are personal, and help to make up his *status*, along with his duty to obey his superior officer, if he is also a soldier.

Sir John Salmond finds a fundamental distinction between proprietary and personal rights in the fact that the former are valuable, whilst the latter are not.² This is true in the sense that the former constitute part of a man's wealth, whilst the latter are elements in his well-being; but it is certainly not true in the sense that if a personal right were infringed, no pecuniary satisfaction could be obtained in respect of the wrong.

It is sometimes attempted to identify proprietary rights with those which are transferable. Such an identification would not be entirely accurate. Certainly all transferable rights are proprietary, since they are on that account capable of being assessed in money. On the other hand, a right to a pension may be unalienable, but it is none the less a proprietary right. Personal rights, however, are inalienable. No one can sell his citizenship, his freedom, or his position as a husband or father.

Proprietary rights are usually considered by continental jurists under the two heads of Property and Obligation. Rights of property are *jura in rem*, whilst Obligation would include all proprietary rights *in personam*. The use of the term Obligation in this sense is undoubtedly derived from Justinian's definition: “*Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendæ rei secundum jura nostræ civitatis.*”³

6. RIGHTS “IN RE PROPRIA” AND RIGHTS “IN RE ALIENA”

The Roman jurists distinguished *jura in re propria* from *jura in re aliena*, terming the latter also *servitutes*. Professor Buckland

¹ *Jurisprudence*, i. p. 369.

² *Ibid.* p. 264.

³ *Institutes*, iii. 13.

defines a servitude, in the Roman sense, as follows : " A servitude was essentially a right or group of rights forming part of *dominium*, but separated from it and vested in some person other than the *dominus*. From another point of view, it was a burden on ownership, a *jus in rem* in another person, to which the owner must submit."¹ Accordingly, to follow Professor Hohfeld's analysis, if A possesses that sum-total of claims, privileges, powers, and immunities in respect of Blackacre, which is known as the ownership of Blackacre, and if he then transfers one or more of those claims, privileges, powers, and immunities in respect of Blackacre to B, B is said to have a right *in re aliena*, since the subject-matter of the right is owned by A, being merely *encumbered* with B's legally protected interest.

A servitude, or encumbrance, may be itself encumbered, as when a sub-lease encumbers a lease.

The right which is encumbered is known as the *servient* right, and the encumbering right is termed the *dominant* right.

An essential condition of a true encumbrance is that the limitation should be transferred along with the dominant tenement, and should attach to the servient tenement, no matter who is the owner of that servient tenement. If such a condition did not exist, then there would be no true encumbering of the right at all, but a personal arrangement would exist between the two persons concerned, limiting the action of one of them ; and, as far as the right is concerned, the arrangement could be circumvented by transferring it. Exceptionally, however, an encumbrance does not pass, together with the encumbered right, into the possession of some succeeding owner. For instance, an encumbrance does not prevail in Equity, in the English system of law, against a purchaser for value of the servient right who receives no notice of the encumbrance. When there exists a possibility that the servient and dominant rights may thus cease to be associated, they are said to be imperfectly concurrent. Frequently, certain encumbrances will run with their servient rights in Equity, but not in law, *e.g.* an equitable mortgage, or a trust.

The chief classes of encumbrances are Leases, Servitudes (in the strict sense), Securities, and Trusts. A Lease is the right to the possession and use of property for a term vested in a person other than its owner. A Servitude is the right to the limited use of land, ownership and possession of which are vested in another. A Security is held by a creditor, in respect of his debtor, its object being to compel the repayment of the debt. It takes the form of some power over the debtor's property. A Trust is an encumbrance over property, by means of which the legal owner is

¹ *A Text-Book of Roman Law*, p. 258.

equitably bound to exercise the rights which he possesses in respect of that property in favour of some one else. Servitudes are considered in greater detail later.

7. PUBLIC AND PRIVATE RIGHTS

The distinction between public and private rights rests upon a similar distinction between persons. When we use the term "public person," we mean either the State, or some particular organ of the State holding authority which has been delegated to it by the sovereign body. Private persons are, of course, all other persons, or, more specifically, members of the State in their character as individuals, or groups of individuals, and not as representing the State for any purpose. Thus, the Postmaster-General is a public person whilst he represents the State, but he has also a private character, and if he makes a contract with a firm of motor-car manufacturers, for them to provide him with a car for his own personal use, when he is not employed by the State as its representative for such purposes, he makes the contract in his private, and not in his public, capacity.

"Publicum jus est, quod ad statum rei Romanæ spectat; privatum, quod ad singulorum utilitatem," says Justinian,¹ citing Ulpian; and the distinction has always been clearly observable in Western systems of law. Public law is applied by the State to regulate relations between itself and subjects, and consequently protects and enforces public rights. Private law is applied by the State between private persons only, and therefore protects and enforces private rights. There exists yet a third kind of law, International Law, recognising rights existing between states; but in this case the enforcement of them is not effected by any dominating external authority, but is left normally in the hands of the aggrieved state.

Public law is of three kinds—Constitutional, Administrative, and Criminal. It is considered in greater detail later.

8. PRINCIPAL AND ACCESSORY RIGHTS

An accessory right is one which augments another right, termed the principal right, thereby increasing the scope of its operation. Examples of accessory rights are the warranties of title and peaceable possession in sale, and restrictive covenants, imposed upon the owner of one piece of land for the further enjoyment by an adjoining owner of his ownership of his land.

¹ *Institutes*, i. 1. 4.

An accessory right is thus frequently an encumbrance, regarded from the standpoint of the owner of the property for whose benefit the encumbrance exists (*i.e.* the dominant tenement); but this is not always so, for a right of action is an accessory right to the right it enforces, but it does not encumber any other person's right.

It is not necessary for a real right to be accessory to another real right, as is the case with servitudes; or for a personal right to be accessory to another personal right (*e.g.* a debt secured by a guarantee). A real right may be accessory to a personal right (*e.g.* a mortgage to a debt); and conversely, a personal right may be accessory to a real right (*e.g.* the covenants to a lease).

9. PRIMARY, SANCTIONING, AND RESULTANT RIGHTS

It has been pointed out in a previous chapter that a right frequently cannot be enforced until it has been infringed; for enforcement implies some degree of compulsion. It is now necessary to consider in what manner rights are enforced.

When a right is infringed, the original right is replaced by another—a right of action against the person who has infringed the original right, and residing in the owner of the original right. This is best exemplified by the infringement of A's right *in rem* by B. After infringement, A has a right to obtain damages from B for the infringement of his right *in rem*, and this new right is essentially a right *in personam*. Here the right *in rem* is the primary right, and the right *in personam* is sanctioning. It should be noticed, from the nature of primary and sanctioning rights, that primary rights may be either *in rem* or *in personam*; but sanctioning rights are always *in personam*, since the very form of an action makes it necessary that it should be lodged against some definite person, or group of persons.

A resultant right is one which arises out of the enforcement of a primary right through the intervention of a sanctioning right. Thus, when a right of way has been infringed, a right of action arises out of the existing circumstances. This right of action exists until judgment and then ceases, when a right to the damages awarded arises, deriving its title from the judgment. Until the damages are paid, this right to damages is enforceable by execution upon the defendant's property. After payment, title to the money is derived from the judgment, but the right assumes the character of a primary right for the purposes of Jurisprudence. In cases of restitution and specific performance the resultant right is always a right in all respects equal to that existing before infringement,

except that the title to it is different, being, in the case of the new right, founded on a judgment. In cases where the State's right is infringed, the State exercises a right of action, and after sentence, it possesses a resultant right to punish the prisoner, which it again exercises.

18.—THE RELATIVITY OF RIGHTS AND DUTIES

IT is never possible to escape completely from the inherited influences of the civilisation into which one is born. Applied to the study of law, this means that fundamentally all our legal conceptions are coloured—albeit very slightly—by Western legal development. Sir Henry Maine realised this, and attempted to broaden the field of juristic thought. In our own day, it is possible to widen it, through consideration of other non-Western legal systems, even further.

The Western conception of a right is that of a protected interest, absolute within its orbit. That is to say, if I have a right *in personam* against X, it is regarded as continuously existing by the Law Courts, and it may be exercised against X at any time, and moreover, it will be protected against any attempted violation by X. Similarly, if I have a right *in rem*, I may again continuously exercise it without interference from others. I may proceed against any one who infringes it, at any time after infringement, until the expiration of a definite period, arbitrarily fixed by the law, beyond which my right of action, in respect of the original right, does not extend. Western Jurisprudence revolves ultimately round this conception of a right. The law, in fact, exists only to protect and enforce rights. It is clear, therefore, that the element of compulsion must perpetually receive emphasis. So long as I think primarily of my *rights*, it is constantly necessary for me to have recourse, even if only mentally, to the assistance of the State to protect them for me. My rights, in fact, are directed against others, who may not recognise them at all, or if they do, may not choose to respect them. Thus, the whole conception of a right implies that there is necessarily some one against whom I can exercise it. If I were alone upon a desert island, I should have no rights. But I should none the less be subject to duties. To avoid the modern juristic conception that there can be no legal duties without correlative legal rights, let it be admitted that the duties are moral, ethical, or religious. They are none the less binding on me. This indicates that a duty is, from one point of view, a higher conception than a right. The latter is external only in effect, and available against another ;

a duty may be owed to oneself, or to one's inner consciousness of right and wrong, and is therefore essentially subjective. This idea has found reflection in the ancient Chinese conception that the object of legal repression was to bring about a state of existence where legal repression was no longer necessary. With the assistance of habit, conservatism, and other forces, legal repression might in time bring men to think primarily of their duties, rather than of their rights. It is true that only certain types of duty (thus termed *legal* duties) could be compelled by law, but these were, as it were, the more essential ones, or perhaps those which the somewhat clumsy instrument of human force could compel. It is significant that the more delicate personal duties were left entirely to the family for regulation. Hence, Chinese law centres round the conception of duty to family, clan, neighbours, and Emperor.

This point is noticed by an eminent authority on Chinese law. Discussing the operation of *patriapotestas* in Chinese law, and comparing it with that which exists in other systems, Jamieson observes: "Roman law emphasises the dominium of the father, which implies duty and obedience on the part of the son. Chinese law looks at it from the opposite point of view; it emphasises the duty and obedience, which implies power on the part of the father to enforce it. There is no word in Chinese which corresponds to *patriapotestas*. The bond which unites father and son is *Hsiao*, filial duty or submission, often translated filial piety, though piety is not the appropriate term. It is the respectful submission to the will of the father, which is assumed to arise naturally out of the relationship."¹

This difference between the Roman and the Chinese views of *patriapotestas* may be taken as symbolical of the difference between Western and Chinese law. Western law exists primarily for the enforcement of rights, Chinese law for the enforcement of duties. Hence the reiteration of the word "submission," and the penal form in which the old Chinese law was cast. This difference may to a considerable extent be due to the differing course of political development pursued in the West and in China. In the West, the ideal for several centuries has been "Individual liberty within the sphere of law." In China it has been uniformity at the expense of individuality, accomplished (and even then only partially) by repression. In Soviet Russia, a new theory has been introduced into law, to develop the new political and economic doctrines current there. "Civil rights," declares the first article of the Civil Code, "are protected by law except in cases where their enforcement would be inconsistent with

¹ *Chinese Family and Commercial Law*, 1921, p. 5.

their social or economic purpose." In other words, a right is now limited. Under certain conditions, it may cease to exist, independently of the will of the owner of it ; or, to put it another way, the State only protects private interests so long as they fulfil certain conditions.

19.—LEGAL PERSONALITY

THE word *person* is derived from the Latin *persona*. This term has a long and interesting history. Originally it meant simply a mask. Later, it denotes the part played by a man in life, and still later, the man who plays it. In this sense, every human being has a *persona*. In later Roman law, however, the term acquires a still more specialised meaning, becoming almost synonymous with *caput*. Thus a slave or an *impubes* has an imperfect *persona*. Last of all, the term comes to denote a being capable of sustaining legal rights and duties.¹

These changes in the meaning of the word are reflected in the history of law. Early law regards all human beings, and they alone, as possessing personality. The development of law necessitates changes. Some human beings, *e.g.* slaves, cease to have a *persona*, whilst things and groups of people acquire one. In Roman law, an inanimate object like the *hereditas jacens* was considered capable of assuming rights and duties. In Greek law, we hear of animals and trees being tried for offences to human beings, and obviously, therefore, they are considered capable of having duties, even if they possessed no rights. Even in the Middle Ages, trials of animals continued. In Germany, a cock was solemnly placed in the prisoner's box, and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client, and the unfortunate bird was accordingly ordered to be destroyed. In 1508, the caterpillars of Contes, in Provence, were tried and condemned for ravaging the fields, and in 1545 the beetles of St. Julien-de-Maurienne were similarly indicted. So late as 1688, Gaspard Bailly, of Chamberg, in Savoy, was able to publish a volume including forms of indictment and pleading in animal trials.²

In all these cases, the animal is considered to be capable of sustaining duties, and is, therefore, to this extent a legal person. The same idea is reflected in Jewish law, where it is provided that the ox that gores must not be eaten. English law derived from early Aryan custom the conception that an animal or in-

¹ Buckland, *A Text-Book of Roman Law*, p. 174.

² For an interesting account of these animal trials, see "Animals in the Dock," by W. Branch Johnson, in *The Nineteenth Century* for February 1928.

animate object which had occasioned serious injury, and more especially death, to a human being, must be surrendered to the vengeance of the injured party or his relatives. In later times, this rule was modified so that the implement with which an individual committed a crime was surrendered to the King as a *deodand*. This survived until 1846. It has already been noticed that at the present day animals are deemed incapable of possessing legal rights and duties.¹

It will thus be apparent that a legal system can personify whatever beings or objects it pleases. In modern law, this personification by law is confined within certain definite limits, but this restriction is obviously based upon convenience.

We may thus divide legal persons into "natural" and "juristic" persons. The former may be defined shortly as normal human beings. The first necessity for a normal human being is that he must be recognised as possessing sufficient "status" to enable him to possess rights and duties. Thus a slave in Roman law did not possess a personality sufficient to sustain legal rights and duties; yet he certainly "existed" in law, for he could make contracts which, under certain circumstances, were binding on his master, whilst certain natural rights which he possessed might have legal consequences if he were manumitted. Similarly, too, in Roman law, an exile or a captive, imprisoned by the enemy, forfeited his rights, and the capacity for holding new ones, although his personality returned to him if he were pardoned, or if he were freed. In English law, an outlaw or one entering a monastery,² lost his personality, thereby becoming incapable of having rights and duties.

The second requisite of a normal human being is that he must be born alive, and further, that he should possess essentially human characteristics. An exception to this rule is an infant *en ventre sa mère*, who for some purposes, chiefly connected with the Law of Real Property, is considered, by a legal fiction, as being actually born.

The Law recognises various grades of legal personality in a human being; and these are generally presumed to correspond with that human being's mental capacity, although exceptionally the differences may have a political origin. Thus, in Roman law, only the full *civis* possessed a personality which was complete in the sense that all rights and duties were possible for him.

¹ The Aryan usage mentioned above is probably exceedingly ancient. The fictitious personality of developed systems of law is much more recent, and probably unconnected with these earlier personifications.

² A monk's personality was considered to return at the moment of death, to permit him to make a valid will.

The capacity of a Junian Latin, *dediticius*, infant, or woman¹ for holding rights was limited in various ways. Similarly in English law, until recently, a married woman was subject to considerable legal incapacity, as a lunatic or infant still is.

Juristic persons may be defined as those things or groups of persons which the law deems capable of holding rights and duties, with a few exceptions—the *hereditas jacens* of Roman law being the chief. Such juristic persons are now composed of human beings, the group comprising either human beings associated contemporaneously (the corporation aggregate), or else successively, in occupying some particular office, *e.g.* of Bishop or Postmaster-General (the corporation sole). It will be convenient to consider briefly the *hereditas jacens* and the corporation sole, before dealing more fully with corporations aggregate.

In Roman law, an inheritance into which the heir had not yet entered was considered to be capable of sustaining some legal rights and duties, and thus was incompletely personified.² It could, however, do nothing involving a conscious act, and so could neither enter into contracts nor commit delicts nor crimes. Some jurists have also attempted to establish a legal personality in the Roman Imperial treasury, or *Fiscus*, and others in the charitable funds of the Latin Empire.³ It is in the highest degree doubtful whether in these two instances the Roman lawyers recognised the existence of any legal personality, and the whole theory seems to be based on an attempt to trace the connection between these funds in Roman law, and the *Stiftungen*, or legally personified Funds for specified, and mainly charitable, purposes in modern German law, where ownership of the property is vested in the fund itself.

The juristic person of the corporation sole is sustained at any given moment by a single individual, occupying some particular office, and thus having a double personality. He has his own private capacity for rights and duties, and over and above that, he has rights and duties in respect of his office. Thus, property acquired by him in his private capacity will pass at his death to his personal representatives, whilst property acquired by him in

¹ Concerning these, Gaius says: "Permissum est itaque parentibus liberis quos in potestate sua habent testamento tutores dare masculini quidem sexus inpueribus, feminini autem sexus cujuscumque ætatis sint, et tum quoque, cum nuptæ sint veteres enim voluerunt feminas, etiamsi perfectæ ætatis sint, propter animi levitatem in tutela esse" (*Institutes*, i. 144). But the truer reason seems to be that agnatic tutors were given to a woman, to prevent property from passing out of her family, through restricting the woman's power of disposing of it.

² See further, Professor Buckland's *Text-Book of Roman Law*, pp. 304 *et seq.*

³ Buckland, *op. cit.* 176 *et seq.*

his corporate capacity will pass to the next occupant of that particular office. The conception is peculiar to English law, and is largely undeveloped. At one time it was doubted whether an English corporation sole could hold personal property, but this question has now been affirmatively answered by the Administration of Estates Act, 1925 (S. 3 (v)). A corporation sole usually terminates when the office in respect of which it is created ceases to exist.

The legal personality of juristic persons is acquired only by State recognition. How this is accorded is exclusively a matter of municipal law in the State concerned. In modern English law, for example, a juristic person may be established by a special statute (a device only adopted where the corporation created fulfils important public functions), or under the authority of general statutes, *e.g.* the Companies Acts, which grant the privilege of incorporation to all groups complying with certain requirements. Formerly, too, corporations were created by grant of royal charters, and a few corporations have acquired their personality through immemorial custom, in accordance with the fiction that a charter once existed, but has since been lost. Many Oxford and Cambridge Colleges were incorporated by charter. An important distinction between corporations created by statute and those created by charter exists in English law. The former may do only those acts which are permitted, expressly or impliedly, in the statutes incorporating them. Corporations created by charter, however, have all the powers of natural persons, except where these are specifically withdrawn by the charter, and in so far as they may be performed by juristic persons.

The advantages of incorporation have been the primary reasons for the creation of corporate bodies. In the first place, incorporation greatly simplifies legal procedure, enabling a person to proceed against one individual, instead of against a great number of persons. Conversely, the corporation proceeds as a single person. In addition, the death or withdrawal of a member occasions no inconvenience to the remaining members of the group through the necessity to withdraw also some portion of the common property, or even to terminate the association altogether—as would be the position if no corporation existed. Thus, in a partnership, death of one member automatically terminates it, and on the withdrawal of a member, he takes his share of the property and profits with him. In a corporation, on the other hand, a member has a share in the corporation, and not a right to any particular portion of the corporation's assets, and the existence of the corporation itself is unaffected by his death or withdrawal, his share being transferred to some other

person, who replaces him as a member. Thus, "a corporation never dies." It exists indefinitely, unless brought to an end in one of certain specified ways. Lastly, a beneficial development of modern law has resulted in the limitation of the financial liability of a member of the corporation. Although limited partnerships are now possible in most modern systems of law, a member of a partnership is more frequently liable to the full extent of his property, not only for his own actions, but for those of his partners as well, if committed in the furtherance of the partnership's activities. In a corporation, a member is only liable to the value of the interest which he holds.

A corporation normally ceases to exist as a result of judicial proceedings, termed "the winding-up" of the company, or liquidation proceedings. Liquidation may be either voluntary, in which case the members of the corporation petition for its termination, usually when the objects for which it has been formed have been fulfilled; or involuntary, where the petition for termination is presented by persons outside the corporation, usually creditors who wish to realise whatever assets the corporation may possess, in order to secure the payment of some proportion of their debts. Sometimes, however, a corporation may terminate as a result of the failure of its members. This was the position of corporations in England at common law, but it does not necessarily follow that corporations created by statute automatically cease to exist on the death of the last surviving member. On the other hand, the better opinion seems to be that they do not.¹

In English law there are certain additional modes by which corporations created by charter may be dissolved. This may occur :

1. By Act of Parliament.
2. By voluntary surrender to the Crown of the charter of incorporation.
3. By forfeiture of the charter, for negligence or abuse of its franchises, the theory being that the corporation has broken a condition of its incorporation.²

Those persons who stand in some definite relation, of a permanent nature, to a corporation aggregate may be divided into the three classes of members, beneficiaries, and agents. The members are those persons who form the group personified by the law; the beneficiaries are those persons in whose interests

¹ Salmond, *Jurisprudence*, 7th edn. p. 340.

² Stephen, *Commentaries*, 19th edn. i. pp. 330-1.

the corporation is organised ; whilst the agents are those whose acts are attributed by the law to the corporation. These three groups of persons need not necessarily be distinct. In the case of a small body of men forming a corporation to prosecute a business in their own persons for their own benefit, each member of the group is also a member of the corporation, a beneficiary, and an agent of it. In charitable corporations, the three groups are usually distinct. In the case of a hospital, the members of the corporation are the founders, the beneficiaries are the inmates, and the agents are the trustees.

A corporation having no material existence, it is clear that it must always act through its agents, and the extent of the corporation's responsibility for the acts of its agents has created a good deal of difficulty. To say that the corporation should be made liable for the acts which it authorises is to settle nothing. A corporation formed for the purpose of running motor-omnibuses may authorise its drivers to drive their vehicles in the City of London. If one of the drivers runs down a pedestrian, does the corporation authorise this, too ? Again, an agent purports to contract on behalf of the corporation. What evidence has the other party that the agent really possesses the authority of the corporation ? These questions have been variously answered. In the sphere of contract, it has been decided that generally a corporation contracts under seal, the presence of the seal being evidence of the assent of the body corporate. To this rule, however, in English law, there exist many exceptions, some of them of considerable generality. Further, the relation of the corporation to its agents falls within the ordinary law of master and servant, so that an agent is bound to act within the scope of his authority, if he wishes the act to bind the corporation. Again, the corporation's capacity to act may be limited by the terms of its charter ; or if created by statute, by the statute creating it ; or either type of corporation may be prohibited by statute absolutely from performing certain acts at all, *e.g.* the purchase of land. In any of these cases, any attempt to perform such an act would be *ultra vires* as far as the corporation is concerned, and consequently would have no legal effect.

In the sphere of tort and crime, it was at one time thought that since a corporation was a creature of the law, it therefore could not authorise any illegality, since that would be automatically *ultra vires*. Moreover, many torts involve a mental element, this being usually malice or fraud, whilst in the great majority of crimes it is also necessary to prove a guilty state of mind in the wrong-doer. Again, a corporation cannot be imprisoned. As far as the law of tort is concerned, it is now settled that the

liability of a corporation scarcely differs from that of an individual, since the wrongful acts of agents acting within the scope of their employment are attributed to it—even if the tort was one involving malice. In crime, the concurrence of three elements is necessary before liability can be properly attributed to the corporation:

1. The crime must be one in which it is not necessary to prove a guilty state of mind in the person charged.
2. The offence must be of a kind that the act or omission of the agent may also be said to be the act or omission of the corporation.
3. The punishment must be a fine, at least as an alternative, or some other punishment which may be inflicted on the corporation.¹

Corporations (whether sole or aggregate) may be divided into lay and ecclesiastical corporations, and the former may in turn be divided into civil and eleemosynary, *i.e.* corporations organised for charitable ends. Civil corporations are again of two kinds, being either organised primarily for governmental ends (*e.g.* a municipal corporation) or organised primarily for commercial ends (*e.g.* a trading company).

Since a corporation has no physical existence, the question of its nationality and domicile has created some difficulty. As far as nationality is concerned, it may be laid down as an initial principle that a corporation incorporated in accordance with the requirements of English law is an English corporation, and one incorporated according to foreign law is a foreign corporation. The latter, however, is recognised as a legal person by English law, and as such can sue and be sued in English courts. In normal times, this question of nationality may be taken to be conclusively settled by the place of incorporation, but in time of war, problems arise. Suppose State A and State B to be at war. A group of members of State A, living in State B, are incorporated in accordance with the laws of State B, to carry on commercial activities exclusively in State A. From the standpoint of State B, is this a corporation of the nationality of State B, or an enemy alien? The point was raised in English law, but not decided, in the famous *Daimler Case* in 1916,² and its solution is one of the most difficult in modern law. It seems hard to resist the inference in a case such as that just stated, that from the standpoint of State B, the corporation is of enemy nationality.³

¹ Stephen, *Commentaries*, i. p. 328.

² A.C. 307.

³ See further, "Foreign Corporations in International Public Law," *Journal of Comparative Legislation*, viii. p. 81.

The entirely separate question of the domicile of a corporation is also one of some difficulty. The general principle seems to be that a corporation is domiciled where its office, or head office, is registered, provided that it carries on its business there. In the *Daimler Case* previously mentioned, however, it was ruled for English law at least, that if a corporation is registered in England and carries on business in England, it may nevertheless have an enemy domicile if all its shareholders are enemy aliens. A corporation may, however, have more than one domicile. Thus, in *Swedish Central Co. v. Thompson*,¹ it was ruled that a corporation may have one domicile where its registered office is situated, and another where the controlling influence in the corporation is situated.

It has been pointed out that a corporation has no material body, or physical existence. It does not necessarily follow, however, that the corporation has no actual existence *at all*. The view is energetically maintained by some writers that a corporation does actually exist, and has a will of its own. This idea is received with frank scepticism by most writers. Thus, Professor Holland dismisses the question of the reality of a corporation's existence by citing one or two phrases from the writings of Pope Innocent iv. with approval, and then adding: "It is difficult to understand the opposition to it of modern writers, who, for instance, maintain that 'a corporation is no symbol, but a living organism; no collective name or part of state machinery, but a living organism and a real person with body and will of its own.'"² Maitland and Gierke, however, seriously maintained the theory.

It would be undesirable to open up the whole range of the subject for consideration here, but one or two aspects of it may be noticed. The opponents of the "real" theory of a corporation contend that a corporation has no personality whatever apart from what the law confers upon it. The supporters of the theory insist that the law merely recognises something which already exists, and which, moreover, enjoys an existence totally distinct from that of any of its members. In the first place, we may notice that many bodies, corporate and incorporate, pursue policies quite distinct from those of any of their members. Investigations into the psychology of groups prove that groups are frequently more impulsive than any of their constituent individuals. Thus a mob is notoriously the creature of a moment. The principle has even been recognised in English Parliamentary procedure. A private member cannot propose an amendment to a money bill, increasing the sum-total of the public revenue which it is intended to distribute in various ways. Again, when-

¹ (1925), A.C. 495.

² *Jurisprudence*, p. 99.

ever moderately constant groups assemble frequently, the influence of the group tends to affect the actions of the members.

To take the largest and most important groups of all, it is plain that states, apart from legal regulation, influence the conduct of their members. Patriotism, in the last resort, is merely evidence of the influence of group personality upon the mind of the individual. Thus, the inference is that a corporation is a real person, with an actual existence, although not a physical human being. At the same time, it should be noticed that the arguments thus briefly set forth would apply with equal force to many unincorporated associations. Clearly, then, incorporation does not create a real legal personality. It merely recognises something which is already existing. It recognises, in short, "group personality"—a personality which imposes limitations upon the actions of the members of the group, in respect of their membership. According to this hypothesis, therefore, it is claimed that a corporation is more than a symbol—a conveniently short way of saying that the law considers it convenient for certain groups of persons to be considered one person for specific ends ; but that it exists in the form of "group personality" before it obtains legal recognition. A discussion why the law chooses to recognise certain "group personalities," while denying legal recognition and separate legal existence to others, would be too remote from the subject to merit discussion here.¹

Before leaving the subject of persons who can hold rights, it will be convenient to consider briefly the question whether there is such a thing as a contingent right, *i.e.* a right which exists, but which only rests upon a condition to be fulfilled in the future, the right being in the meantime without an owner. It may be taken as a legal maxim that ownerless rights are impossible, although rights, the owners of which are uncertain, may, as soon as the owner becomes certain, exist. Sir John Salmond, arguing from these premises, says : "Although every right has an owner, it need not have a *vested* and *certain* owner. Thus the fee-simple of land may be left by will to a person unborn at the death of the testator. To whom does it belong in the meantime? We cannot say that it belongs to no one, for the reasons already indicated. We must say that it is presently owned by an unborn person, but that his ownership is contingent on his birth."² Since it has already been agreed that an unborn person (except

¹ See further, Maitland, *Political Theories*, and Gierke, *Genossenschaftsrecht*; Jethro Brown, *The Austinian Theory of Law*, Excursus A; Geldart, *Law Quarterly Review*, xxvii. p. 90; Maitland, *Journal of Comparative Legislation*, N.S. xiv. p. 92; Gray, *Nature and Sources of the Law*, Sects. 111-28.

² *Jurisprudence*, p. 242.

one *en ventre sa mère* under certain circumstances) is not capable of having rights and duties, this seems an unsatisfactory solution of the problem. The true explanation of the difficulty would seem to be that the unborn child has a chance to a right, *i.e.* the right only exists when the child is born. The matter certainly becomes clearer if we think of a right, not to real property, but to citizenship. Every unborn child has a chance of possessing this right through being born, but certainly no right exists until the child is actually born.

20.—STATUS

THE nature of status has already been noticed. It is, as we have seen, the sum-total of a man's personal, as distinct from his proprietary, rights and duties. It is obvious, therefore, that every legal person has a status. In this chapter, however, only those legal persons whose capacity deviates from the normal will receive consideration, and it must first be noticed that not every legal incapacity involves abnormal status. A drunken man can hardly be said to have a special status, although drunkenness entails incapacity. The status of a lunatic, however, is definitely abnormal. The line of distinction is hard to draw, but the question whether a special status exists or not may best be answered by considering what degree of permanency attaches to the disability of the person considered. A purely temporary disability is not a deviation from normal status, but a special status need not be lifelong. Lunacy may be, and infancy always is, a terminable disability.

Further, it has been noticed that status was formerly more important in law than it is to-day. As Maine puts it, "the movement of the progressive societies has hitherto been a movement from status to contract." Roman text-books had a good deal more to say about unequal legal capacities than have our own at the present day.

It is clear that the corporation, a person artificially constituted by the law, and different in essence from a natural person, must have a special status. This has already been examined when dealing with the question of legal personality. It remains to be considered whether any unincorporated associations possess any of the attributes of legal personality, and hence, a status. The existence of a trade union has now been recognised in modern systems of law by numerous statutes. It may be registered, and if registered, may hold property; it may sue and be sued. It is not, however, a corporation, and thus the fuller legal personality has been denied to it. It seems most correct to say, therefore, that the trade union has several of the attributes of a legal person. Moreover, in English law, it enjoys an exceptional immunity. As a result of the Trade Disputes Act, 1906, a trade union is immune from liability for the tortious acts of its agents, if done in furtherance of a trade dispute.

From first principles it would seem that an unincorporated association, as such, has none of the attributes of legal personality whatever. A partnership is not a legal person, but simply a special relation created between two or more people as a result of contract. In *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*,¹ however, Lord Halsbury said: "If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement." The case in point was one involving a trade union, but the remarks are general in tone, and although the position of a trade union was clarified by the Act of 1906, it may be questioned whether these observations have any applicability to other unincorporated associations at the present time.

The condition of slavery does not exist in modern law, but it was of great importance in Roman law. In the early law, the slave was clearly considered as a chattel, possessing neither rights nor duties. In the later law, not only had his acts legal consequences, *e.g.* a slave could make contracts which bound his master—which obviously a table or an ox could not do—but also he possessed some rights (*e.g.* of appeal to a magistrate against the cruelty of his master). Accordingly, it seems best to regard the slave of later Roman law as possessing an extremely limited personality.

Possessing a somewhat fuller personality, but still exceedingly limited in capacity, was the *colonus* of the later Roman Empire, and the serf of mediæval Europe. The *colonus* was personally free, possessed citizenship, and could contract a valid marriage; but he could not leave the land which he tilled. If he did, he could be brought back again. Nor could he sell his holding. The position of the mediæval serf was very similar. In addition, he was usually debarred from undertaking various occupations (and more particularly from taking holy orders) without his lord's consent.

In Roman law also, there were certain classes of persons who, though enjoying full personal freedom, were yet restricted in respect of citizenship. The Latin (whether a member of a community of Roman colonists, or deriving his status from informal manumission from slavery) had a status which involved heavy incapacities. He could not contract a civil law marriage, nor make a will, nor accept a legacy or inheritance under one. In addition, Latins deriving their position from informal manumission from servitude could not leave any property by will,

¹ (1901), A.C. 426.

since it reverted to their patron, to whom also they owed *obsequium*.

Inferior in *status* to the Latin were the *dediticii*, originally members of communities who had surrendered to the Roman State, and afterwards slaves who, on account of some gross misconduct during servitude, were subjected to perpetual incapacities on manumission. They could never acquire citizenship (as the Latin might), nor were they permitted to live within a hundred miles of Rome. They could not make valid wills, nor benefit under one. The status was abolished by Justinian.

Roman law also distinguished between the free-born citizen and one who had acquired freedom and citizenship only by manumission from slavery. In public law, the freedman was subject to many disabilities; he could not marry any one of senatorial rank, nor take a state contract. He owed *obsequium* to his patron (who had manumitted him), who also possessed certain rights of succession in respect of the freedman's property.

Formerly, law was regarded as being personal, and not territorial. By this it is meant that the law to which an individual was subject was determined by the fact that his parents belonged to some particular community; whereas at the present time the same fact is usually determined by discovering the place where he resides. Perhaps the older theory is derived from the former association of law and religion; but the fact remains that in Ancient Greece only Greeks were entitled to the privilege of regulating their disputes according to Greek law. Foreigners were beyond the scope of its operation, and their disputes were settled by special officials, administering different rules. The same was true of Roman law. The *peregrinus* could never own property in full civil law *dominium*, nor transfer it by civil law modes. He had no rights at all in public law, and his disputes were settled by the *prætor peregrinus* according to the *jus gentium*. The same discrimination against the foreigner formerly existed in later European systems of law. At the present time, however, most of the disabilities in private law have been removed (in England even to-day, however, no foreigner may own a share in a British ship), although a number remain in public law. Thus, no alien may, in England, enjoy either the right to vote at Parliamentary elections, or the right to represent a constituency in the House of Commons. Disabilities resembling those imposed by ancient systems of law still exist in respect of aliens in some Eastern systems, although these are tending to disappear, as Eastern nations adopt law codes modelled upon those of the West. Thus, formerly in Turkey, Persia, Siam, and Japan, and still in China, the alien's right of residence was materially re-

stricted, there were many commercial enterprises in which he may not participate, and his disputes were settled in special extra-territorial tribunals.

Quite distinct from the status of the alien in time of peace is that of the enemy alien in time of war. According to English law, he may enter into no valid contract with a British subject, nor prosecute any claim against a British subject in an English court. On the other hand, he may be sued by a British subject, and if he is sued, he may defend the action.

In Roman law there were certain other persons who were subject to special incapacities. Thus *infames* could not hold any public offices, and were subject to special disabilities in the law courts. The class was composed of those who had been guilty of grave misconduct or serious crimes, or who pursued shameful occupations.

Intestabiles could neither give evidence in litigation nor act as witnesses in formal transactions.

Celebes (unmarried persons over twenty-five, if males, and over twenty, if females) could not claim under a will under early Roman Imperial statutes, whilst *orbi* (childless married persons) could only take one-half the amount bequeathed. *Pater solitarius* (a widower with children) was also subject to disabilities which are not known.

Deaf and dumb persons could not make a contract by *stipulatio*, since this was a verbal contract.

On the other hand, there were one or two specially privileged orders in Roman law. Senators had numerous special rights in public law. In private law they could not take the benefit of government contracts, and they were unable to contract a valid marriage with freedwomen. An order with similar privileges was that of the knights, whose special capacities were again chiefly in the sphere of public law.

Infancy has been recognised as the occasion for a special status in all systems of law, although the age at which it has been held to terminate varies. In Roman law, infancy was terminated at fourteen for males, and twelve for females. If the infant was *sui juris*, it was necessary for a tutor to be appointed, to concur in the majority of the infant's legal activities, before they were recognised as binding. In this, however, a distinction was recognised between a child of exceedingly immature years, possessing no *intellectus*, and one approaching maturity. The former could perform no legal acts whatever, and the tutor administered his property for his benefit, whilst an infant of mature years was allowed to perform legal acts, if these were ratified by the tutor. It was recognised, however, that even at fourteen

or twelve, the Roman citizen was far from full maturity of outlook, and accordingly the law required the appointment of a curator for a person between the ages of twelve or fourteen and twenty-five before certain classes of transactions (*e.g.* those not obviously for the young person's benefit) could be enforced. Modern continental law in general retains the age of twenty-five as the date at which infancy terminates. In England, it is twenty-one as regards public rights, and the capacity to make binding contracts (other than contracts for necessities, which are binding upon an infant), and the capacity to hold a legal estate in land. In tort the question of infancy does not affect liability, whilst in criminal law there is an irrebuttable presumption that an infant under the age of seven cannot commit a crime (for which *mens rea* is usually necessary), whilst there exists a rebuttable presumption that an infant between the ages of seven and fourteen cannot have a criminal intention.

Distinct in Roman law from the incapacity arising from infancy was that resulting from the subordination of a son to the *potestas* of his father—an incapacity which existed throughout the lifetime of the father, unless the son was formally emancipated from it. It had no application to public rights and duties, but in private law the *filius familias* could, in legal theory, own no property, although in the later law there existed certain types of *peculia* which were set aside for his special benefit. These, however, except the *peculium castrense* (earnings of the son whilst on military service), reverted to the father, if still living, on the death of the son. This disability is not reproduced in any modern system. Achievement of majority coincides with termination of parental authority.

Lunacy produces a special status. In Roman law, it terminated an individual's capacity to deal with his own affairs, the interposition of a curator being necessary. In English law, a lunatic may not be elected to, or sit in, Parliament, whilst his contracts have no legal consequences, provided that they are not for necessities and that the other party is aware of the lunatic's condition at the time when the contract is made.

In Roman law, a person suffering from some permanently incapacitating disease, as well as a person who senselessly wasted his property (*prodigus*), was subject to an incapacity similar to that of the lunatic, and a curator was appointed to act on his behalf. A similar disability on prodigals appears in some modern continental codes.

Sex has been a ground for disability in all systems of law, as regards both private and public rights. In Roman law, a woman had no public rights, whilst in private law, if free from *patria-*

potestas, she was subject to tutorship, primarily in the interests of the family. In English law, the public disabilities of a woman have recently been for the most part removed, so that she is now able to enjoy the franchise, and to be elected to the House of Commons. No woman, however, may sit in the House of Lords. In private law, the position of a woman does not differ materially from that of a man.

Distinct from the disability resulting from sex is that imposed by marriage. In early Roman law, the consequence of a full civil law marriage was that the wife and her property passed absolutely from the family of her father to that of her husband, to whom she stood in the general position of a daughter. In the later law, these disabilities practically disappeared, owing to the evolution of a form of marriage without *manus*. In English law the rule was that "by marriage, husband and wife became one person, and that person is the husband." Accordingly, all her property became vested in the husband, whilst the wife became incapable either of contracting or making a will. Equity went a long way towards improving her position, by developing the doctrine of the married woman's separate estate. Eventually the Married Women's Property Acts created the separate *legal* estate of the married woman, in respect of which she enjoys all rights and remedies as if she were a *feme sole*. Even now, however, her status is not exactly identical with that of an adult male, for her civil liability is proprietary, and not personal.

Religious belief, differing from that prevailing among the majority of inhabitants in a particular state, has been a general ground for legal incapacity in the past, both in public and private law. In England, for example, Jews, Roman Catholics, Quakers, and atheists were debarred by the necessity for taking oaths in a prescribed form from sitting in Parliament until the nineteenth century, whilst Restoration statutes imposed for a period rigorous limitations upon the rights of residence and public worship of Nonconformists. In other systems of law, freedom of residence has been limited, and certain forms of property have been excluded from the ownership of those professing certain forms of religion.

Race, as distinct from mere alienage, has been an additional disability in many systems. Formerly, in the United States, public rights were denied to negroes. In South Africa, at the present day, the franchise is limited with respect to those of non-European descent, whilst their right of residence is restricted.

The King, in English law, has a peculiar status. In public law, he acts only on the advice of his Ministers, who accordingly assume full responsibility for those acts. In private law, no

action in tort will lie against him. In contract, claims against him must be prosecuted by means of a "petition of right."

Heads of foreign states are similarly immune from legal process, as are also foreign ambassadors and their subordinates resident within a state. Consular officials enjoy a more limited immunity, extending only to those liabilities which might interfere with the discharge of their consular functions.

In England, the status of the government official scarcely differs from that of the ordinary citizen. He is answerable for his public acts equally with those done in his private capacity. A few Ministers of State, however, are immune from responsibility for the acts of their subordinates. Abroad, the status of the public official differs more fundamentally from that of the private citizen. Generally speaking, for acts done in his public capacity, the official is answerable only in special administrative courts, when the defence "act of state" affords a ready cover for many of his activities.

Soldiers (and usually sailors), in most countries, have a special status. In the first place, in addition to their subjection to the ordinary law of the land, they are also subject to military law. Further, they usually enjoy special privileges. In Roman law, a soldier could make a valid will in any form, and he was also exempt from the liability to undertake tutorship. In English law, soldiers on active service, and sailors at sea, may make wills exempt from the provisions of the Wills Act, 1837. A soldier on active service also possesses the Parliamentary franchise though still an infant.

A clergyman in English law is subject, not only to the ordinary law, but also to ecclesiastical law, administered in diocesan and provincial courts. He is also incapable of becoming a Member of Parliament. In Roman law, advocates and jurists were unable to sue for their fees—a disability which still attaches in English law to barristers.

A peer in English law has certain disabilities, and one or two privileges. He enjoys the right, in public law, to a hereditary seat in the House of Lords, and as such, to proffer counsel to the Crown in person. In criminal law, he has the right to be tried by the House of Lords for treason or felony. On the other hand, he is disqualified from election to the House of Commons.

Conviction for felony renders an individual, according to English law, devoid of all legal capacity, if no pardon has been obtained, or the sentence has not been served. After the sentence has been served, the convict reverts to his former status.

Bankruptcy imposes a disability in public law, until an honourable discharge has been obtained, for the bankrupt is ineligible

for a seat in Parliament. Further, in private law, whatever he acquires (with a few exceptions), he acquires for the trustee in bankruptcy, whilst he commits a crime if he obtains credit for more than £10, or enters into business, without announcing that he is an undischarged bankrupt.

Illegitimacy in Roman law involved disabilities. Illegitimate persons could not take on intestacy, and imperial legislation restricted their right to succeed even if instituted *heredes*. In English law, an illegitimate child has no claim on the estate on intestacy. In most systems of law (including, since 1926, English law), such a person may be legitimated by the subsequent marriage of the parents.

In most systems of law, a person entering a monastery was considered in the same way as one dying, and not only was he incapable of further legal acts, but his estate was administered as if he had actually died.

Before leaving the question of status, it should be noticed that the same conception exists in international law. Only modern, independent states, possessing defined territory and reasonably stable governments, and admitted within the Society of Nations, are recognised as full legal persons, with normal status. The British Dominions, which are also members of the League of Nations, seem to occupy the position of adult Romans under an attenuated *patriapotestas*. Mandated territories are generally recognised to be subject to tutorship, while states not yet received within the Society of Nations are regarded from the same standpoint that peregrines were as regards the *jus civile*. The analogies, it must be admitted, are not perfect, and should be used with caution, yet they assist in clarifying legal relations which would otherwise be extremely obscure.

21.—OWNERSHIP

THE right of ownership is a conception fairly easy to understand, but difficult to define with exactitude. Austin defined it as "a right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration." This is not altogether an accurate definition. Unrestricted user in all systems is qualified by the law of nuisance, in accordance with the maxim *sic utere tuo ut alienum non lœdas*. Again, the second point of Austin's definition is not true of ownership in continental systems of law, for while property may be freely alienated during the lifetime of the owner, a considerable proportion of it must descend to a man's family, altogether apart from his own wishes in the matter. Blake-Ogders defines ownership as "a right to hold, use and enjoy land or things to the exclusion of every one else,"¹ but this merely enumerates some of the more important incidents of ownership, all of which may be invested (and all but one simultaneously) in some person other than the owner. Many jurists, again, attempt to define ownership as a right of plenary control.² This is unquestionably what ownership is in the ideal state, but it is hard to see what plenary control an owner of land has, when his property is subject to a lease for a thousand years, in addition to several servitudes and restrictive covenants. Again, an individual's plenary control is further limited by any restrictions the State may care to impose, as well as the law of nuisance already noted. Accordingly, it seems best to define ownership as the ultimate right to the enjoyment of a thing, as fully as the State permits, when all prior rights vested in persons other than the one entitled to the ultimate use, by way of incumbrance, have been exhausted.

Although we speak of ownership as a right, it would, indeed, be preferable to speak of it, following Professor Hohfeld's analysis, as a collection of rights, privileges, and powers, some of which are frequently found to reside, either for a limited period or perpetually, in persons other than the owner. Thus a lease encumbers the ownership of land for a fixed period, whilst a servitude may encumber it perpetually.

The objects over which the right of ownership extends are termed *property*. In the widest sense in which the term is used,

¹ *Common Law*, i. p. 17.

² Cf. Holland, pp. 208-9.

therefore, all rights, of whatever nature, may be owned. Regarding ownership in the narrower sense, however, as applying, not to the rights themselves, but to the objects over which rights may be exercised in law, it is clear that property may be of two kinds, being either corporeal, *i.e.* having some tangible existence in the material world, or incorporeal, *i.e.* having no such tangible existence. Corporeal property is thus identical with Austin's conception of a thing, and may be either immoveable, *i.e.* land and all things permanently attached thereto, or moveable, comprising all other material things. Incorporeal property is the creation of developed systems of law. It includes all those valuable interests in respect of non-material things which the law has marked out for special protection, *e.g.* trade-marks, copyrights, designs, goodwill, etc. A special type of property was recognised in Roman law—the *universitas bonorum*, or the whole collection of an individual's assets, together with his liabilities, considered as a single, undivided whole.

Two conflicting claims to the exclusive ownership of a thing may not exist together. At the same time, it is clear that the right of ownership need not necessarily be vested in a single person. Two persons may join together to buy a motor-car, and if they do, no fraction of the car belongs to either, but both together own the whole. In other words, from the standpoint of the ownership of the motor-car, the two persons are regarded as one. Of such co-ownership, there may be several kinds, and the following are recognised in English law :

1. Joint tenancy (of land). Here the unity existing between the joint owners is so complete, that they derive their title from the same document, and moreover, when one joint tenant dies, his interest accrues to the survivor or survivors.

2. Tenancy in common of land. Here each tenant has a right to the possession of the whole, but the interest of one may be greater than that of the others, and the tenants may hold under different titles. There is no right of survivorship, and the tenancy approximates as closely as the differences between the forms of property permit to the co-ownership of chattels. This form of ownership by two or more now exists only in Equity.

3. Coparcenary arose at Common Law (*a*) where a tenant in fee-simple died intestate, leaving female heirs only ; (*b*) where the tenant of an entailed interest died, leaving only female heirs. Since 1925, it arises now only in the case of an entailed interest. Coparceners, like joint tenants, have unity of title, interest, and possession, but there is no right of survivorship.

4. Tenancy by entireties existed before 1925 in cases where a husband and wife acquired land in such a way that if they had

not been married they would have taken as joint tenants. Here the unity of the parties was so complete that they were not able to sever their interests to permit each to take half—a right which exists in respect of all the other forms of co-ownership.

In Roman law, more than one type of ownership existed. The full civil law ownership was entitled *dominium*, but this could arise only in consequence of formal civil law modes of transfer in respect of certain types of property (*res mancipi*). Provincial land was subject to an inferior type of private ownership, since *dominium* was attributed to the State. It was transferred by informal modes. Again, only Roman citizens could enjoy *dominium*, so that an alien again had an inferior type of ownership, which could be transferred informally. Finally, there was bonitary ownership, which arose when an owner transferred a *res mancipi* by an informal mode. At first, such a bonitary owner was compelled to rely largely upon the good faith of the transferor for protection, but before the end of the Roman Republic he was as well protected as a *dominus*.

English law also recognises two forms of ownership, *i.e.* legal and equitable. The legal owner is he whom the Common Law would designate as the owner; the equitable owner is that person whom the Court of Chancery formerly protected in his enjoyment of a thing, even where legal ownership was outstanding in another, and the legal owner claimed. Equitable ownership always predicates an outstanding legal ownership, the legal owner being restrained by the rules of Equity from using his legal ownership to the detriment of the equitable owner. On the other hand, legal ownership does not necessarily imply the existence of an equitable owner. The property legislation of 1925 has made use of this conception of dual ownership, in order to facilitate the transfer of real property in England. Many interests which may exist with regard to land and otherwise would tend to impede the disposition of it, are now permitted to exist as equitable interests only, and it is enacted that a purchaser of a legal estate, provided that the requisite formalities are observed, may obtain a clear title, free from most equitable interests, which operate upon the purchase money. A good example is the life interest. Formerly this could exist both as a legal and as an equitable estate. Now, it may exist as an equitable interest only. The most common example of equitable ownership is that which exists under a trust. This will be described later.

Finally, it remains to notice the distinction which exists between vested and contingent ownership. Vested ownership exists when the right is fully and finally assigned to some specific individual, even though his ownership is not to arise until some

future period. In contingent ownership, however, there is an assignment of the right, upon a condition, which is to be fulfilled in the future. In such a case, ownership is not acquired unless the condition is fulfilled. Thus, if land is granted to A for life, and then to B, B has vested ownership of the land. Even if he is not alive at the death of A, his heirs will enjoy the benefit of it. On the other hand, if land is granted to A for life, and then to B, if he shall survive A, then B's ownership is contingent, since it depends entirely upon the condition that he survives A, whether he and his heirs ever enjoy any interest in the land.

22.—POSSESSION

“**P**OSSESSION,” says the old proverb, “is nine points of the law.” Put in another way, this implies that he who has conscious control of an object need only surrender his control to one who can establish a superior claim in law.

To the lay mind, possession implies that relation to an object which involves the exclusion of other persons from the enjoyment of it. In other words, it is regarded as a fact resulting from a given set of circumstances. As such, it was regarded as a fact of extreme importance in early law. Probably the earliest law of all recognised a man's legal interest in a thing only so long as he continued to possess it. So, among some of the most primitive Australian tribes at the present day, what is no longer in the possession of any member of the tribe may be appropriated afresh. In other words, ownership has no existence apart from possession in fact. In more developed systems, though ownership may be regarded as continuing to exist although possession has been lost, possession nevertheless remains of cardinal importance. An owner naturally wishes to regain possession of goods wrongfully withheld; but possession is patent to all, whilst ownership may take some time to establish. To whom will the goods be committed, whilst ownership is established, and to whom will the goods be awarded if the claimant fails to establish his title? Again, will not “the law's delays” in vindicating title lead an alleged owner to attempt to recover his goods by force from one who detains them? These reasons have led all systems of law to recognise in possession itself, altogether apart from any question of ownership, a ground for legal protection, on the fulfilment of certain conditions. More especially has the desire to prevent frequent breaches of the peace led the State to protect the possessor in his holding.

Possession in law is the continuing exercise of a claim to the exclusive control of a thing. Possession in law and possession in fact are not invariably co-terminous, although very frequently they are. Thus, in English law, a servant is not deemed to have possession in law of his master's goods, though he has possession in fact. He is considered to have detention merely, for the intention to possess is attributed to the master. In other words,

possession in fact is a fact—a physical relation to a thing ; whilst possession in law is a right, recognised and protected by law.

Distinct again from both possession in law and possession in fact is the right to possession, which is simply the right belonging to an individual to have possession vested in him.

One further important fact must not be overlooked. The law demands certain essentials which will be considered shortly, before legal possession exists. It does not demand, however, that those essentials should have arisen in a lawful manner. In other words, possession may exist in law, having important legal consequences, even although physical control of the object was obtained unlawfully. Thus, if B steals goods from A, and C in turn steals the goods from B, although A has rights against both B and C, nevertheless B, as regards C, is a prior possessor (although a thief), and in consequence has certain important rights against C. Theoretically, he can recover possession of the goods from C.

Under these circumstances, it is not surprising that the question whether possession has existed or not is of cardinal importance in the daily work of the Law Courts, and that the elements of possession have received repeated and close scrutiny. In order that possession as a right may be said to exist, the would-be possessor must have, as regards the object considered, both the *corpus possessionis* and the *animus possidendi*.

By the *corpus possessionis* is meant that relation of a person to a thing, in consequence of which he is in the position to exclude others from the enjoyment of it. This seems a simple enough conception, but it is not free from difficulty. Money in the purse in the pocket of an individual is in his possession. If he takes his purse out of his pocket, drops half a crown into the gutter, and passes on without noticing his loss, the *corpus* element of possession is no longer present, and in consequence, the half-crown is no longer in his possession. On the other hand, if an individual leaves his motor-car by the pavement, whilst he enters a shop to buy cigarettes, the car continues to be subject to his control. In this case, the *corpus* element is not lost, and there is consequently no loss of possession. Accordingly, the question whether *corpus* exists or not depends, amongst other things, upon the nature of the object itself. Again, when entering into possession of real property, it is not necessary to take physical control of the whole of it. The *corpus* element is satisfied when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors negating his control—for example, the continuance in occupation of one who denies his right. Again, taking physical control of an

enveloping object implies also the acquisition of physical control over the objects it encloses. So when a man exercises the *corpus* element over a house, he also exercises the *corpus* element in relation to its contents. Problems of the degree of control which exists sometimes arise more especially in international law. Thus, if the nationals of a state plant their national flag upon the shores of an island, is the *corpus* of possession sufficiently fulfilled to permit the State to take possession of the whole island? International law recognises this as sufficient to confer possession, but, if unaccompanied by further acts, as insufficient to confer *ownership*. Similar problems sometimes arise in private law. Thus the *Institutes* consider the problems resulting from the pursuit of wild animals and the catching of fish. In these cases it would seem that the *corpus* element is not satisfied until the animal is finally made subject to the pursuer, in such a way that all probability of escape has departed. Similarly, the *corpus* element is only satisfied so long as this physical mastery of the thing persists, so that if a wild animal escapes from captivity, *corpus* ceases, and possession is lost. On the other hand, if a domestic animal strays, so long as there is reasonable probability that it will be retrieved by the owner, *corpus* remains. When Saul hunted for his father's asses, theoretically they were still in his father's possession, although the case was daily becoming a more extreme one. Similarly, cattle in the Western States of North America, branded with the owner's mark, pasturing miles from his homestead, and only rounded up twice a year, are still in the possession of the owner.

In an anonymous case in the Court of Queen's Bench, 1584, it was established that if one cuts the girdle of another, so that the purse falls to the ground, this is not a transfer of possession to the wrong-doer, but it would be otherwise if he had actually handled it.¹ A still more illuminating case illustrating the nature of *corpus possessionis* is *R. v. Chissers*.² A person came into a shop and asked to see some linen. The proprietress handed some to him, but before any sale was completed, he ran away with it. This was held to be larceny, as there was no change of possession until he ran away, the *corpus* element before remaining unaltered. On the other hand, a temporary disposition of an article may be sufficient disturbance in the physical control of an individual over his property to warrant the assumption that a change of possession has taken place, as a result of the cessation of the *corpus possessionis*. So, where sheets were removed from one room to another by a thief,³ or where plate was removed to

¹ Kenny, *Select Cases in Criminal Law*, p. 211.

² Kenny, p. 217.

³ Anon., Kenny, p. 219.

another part of the same room,¹ or finally, where a pocket-book was raised slightly in a pocket and then relinquished, as in *R. v. Thompson*,² in all these cases there was an interruption of physical control (*corpus*), even though temporary.

From the foregoing examples it will appear that the *corpus* of possession is not necessarily synonymous with physical power to exclude others. The weakest human being may enjoy the *corpus* element so long as he breathes, even though he may be too young or too feeble to have the *animus possidendi*. *Corpus*, therefore, depends more upon the general expectation that others will not interfere with an individual's control over a thing, than upon the physical capacity of an individual to exclude others.

The *animus possidendi* is the conscious intention of an individual to exclude others from the control of an object. This does not necessarily imply that the individual claims as owner. Frequently, in fact, he is fully conscious of the fact that he is not. Again, the intention to exclude need not be in his own interest. A carrier of goods has the *animus possidendi* (as well as the *corpus possessionis*), but he makes no claim to the goods on his own behalf, but on behalf of the owner. If he is wrongfully deprived of the possession of the goods, he demands their retrocession, not because he has any ultimate interest in the goods, or in their continued existence (though normally, of course, he receives payment for their safe arrival), but because he is a possessor who has been deprived of the objects in his possession. Moreover, *animus* need not be specific. I have possession of every book in my library, even though I have only the general *animus* to possess the whole, and although I may have forgotten the existence of some of the books altogether. Again, the *animus* need not be based on a legally enforceable claim; it may be the product of an unlawful undertaking, as where a thief appropriates the goods of another. The *animus*, however, must be sufficiently wide to cover the actual article considered. Thus, when a person was indicted for the larceny of a banker's draft, contained in an envelope delivered to him by mistake, since his name was the same as that of the addressee, there was held to be no larceny, as the intention on receiving the envelope was to receive also its contents, and at this point his intention was an innocent one, possession being therefore obtained innocently.³ On the other hand, where a man bought a bureau at an auction, and later found and appropriated money in an unknown secret drawer, this was held to be larceny, as although the *animus* to possess the bureau was present when the drawer was bought, there was no *animus*

¹ *R. v. Simson*, Kenny, p. 219.

² Kenny, p. 221.

³ *R. v. Mucklow*, Moody C.C. 160.

to possess the money until it was discovered.¹ The whole law was exhaustively examined in *R. v. Ashwell*,² where A gave, and B received, a guinea on a dark night, both believing it to be a shilling, and B subsequently discovered the error and appropriated the guinea. Here *corpus* is clearly acquired when the guinea is handed over, but when does *animus*, as far as the guinea is concerned, arise? B's *animus*, at the time of handing over, is exclusively in relation to a non-existent shilling. This, however, would hardly seem to satisfy the essential requirement of *animus* (especially when *Merry v. Green* is remembered), and so it would seem that *animus* only arose, and possession only began, when B discovered the mistake. From this it would appear that B was guilty of larceny. But the Court for Crown Cases Reserved had grave doubts over the matter, and fourteen judges were equally divided. As Cave, J., observed with force, "a man has not possession of that of the existence of which he is unaware."

Possession confers on the possessor all the rights of the owner except against the owner and prior possessors. This is admirably illustrated by the old case of *Armory v. Delamirie* (1722).³ A chimney-sweep's boy found a jewel and took it to the defendant's shop to discover its value. The defendant refused to return it, alleging that the boy was not the owner. The boy was allowed to recover, since as regards the defendant, he was a prior possessor, and the defendant was in no sense claiming on behalf of the true owner. So, in English law, a bailee, being a possessor, has all the rights of the owner, against those who deprive him of the goods bailed to him, even though he is not responsible to the bailor for their loss.⁴

Possession may be a relation which exists directly between the possessor and the thing possessed, when it is said to be immediate; or it may exist through the intervention of another person, when it is said to be mediate. Thus, in the case of *R. v. Chissers*, already noted, when the shopkeeper gave the linen into the hands of the prospective customer, her possession of the linen became mediate, whilst previously it had been immediate. A further example is furnished by the case of *R. v. Pitman*.⁵ Here the prisoner came to an inn, and seeing a horse, directed the ostler to bring out *his* horse, the ostler being ignorant of the true owner. The prisoner pointed out the horse, and then directed the ostler to saddle it and lead it out of the yard, and at that point the prisoner was apprehended. It was objected that the horse was never in the prisoner's possession, but this objection

¹ *Merry v. Green*, 7 M. & W. 623.

² Kenny, p. 292.

³ 1 Strange, 505.

⁴ *The Winkfield* (1902), P. 42.

⁵ Kenny's Cases, p. 213.

was not sustained, the incident furnishing a clear example of mediate possession. Other examples of mediate possession occur when a person delivers goods to his servant. Sir John Salmond gives as further examples of mediate possession, possession through a bailee, through a pledgee, and of a landlord through his tenant.¹ In these cases, however, it would rather seem that the bailor, pledgor, and landlord have no possession at all, but a right to recover possession at some future date. So, if a tenant fails to pay his rent, the landlord brings an action *to recover possession*. This would hardly be necessary, if he already had it. Thus it would seem that where the relation of immediate possession exists, mediate possession cannot exist. Where, however, one individual has detention of a thing at the will of another, so that legal possession is not attributed to the detainer, but to the person who controls him, mediate possession arises in the controller, the other having detention merely.

As far as the relation of bailee to bailor is concerned, it would follow from Sir John Salmond's account of mediate and immediate possession that an individual could never commit larceny of his own goods, which he had entrusted to a bailee, since such goods would already be in his mediate possession. In a case reported in the Year Books, however, the following opinion is given: "It was said that if I deliver to you certain goods to take care of, and then I retake them with felonious intent, I shall be hanged for it, although the ownership is in me."² The same opinion is given in *The Carrier's Case* (1473),³ and again in *R. v. Macdaniel* (1755),⁴ and received further consideration in *R. v. Wilkinson and Marsden* (1821).⁵ The principle is regarded by Professor Kenny as applicable to all bailments, except bailments at will.⁶ Further, in *R. v. Bunkall* (1864), A gave B, a carter, money to purchase and convey him coal from a railway station. B did so, but appropriated one hundredweight in transit. Counsel for the prisoner strenuously contended that there could be no larceny, as the goods had never been in the possession, constructive or otherwise, of A, to which Cockburn, C. J., replied: "We are all of opinion that there was no larceny at common law."⁷ Again, Crompton, J., observed: "If a man places debentures in the hands of a bailee and dies, the bailment continues, and the executors are entitled to them, although they have never had them in their possession. So again, in the case of a sale, before delivery there is a bailment between the vendor and the vendee, though the latter has not yet obtained possession." According to Sir

¹ *Jurisprudence*, p. 309.² *Kenny's Cases*, p. 253.³ *Ibid.* p. 225.⁴ *Ibid.* p. 260.⁵ *Ibid.* p. 254.⁶ *Outlines*, pp. 196-7.⁷ *Kenny, Cases*, p. 233.

John Salmond's view, however, mediate possession would have been derived by the executors from the deceased at death.

Quite distinct from mediate possession is constructive possession. Thus, if the owner of a warehouse transfers the keys of it to me, I acquire possession of the warehouse and its contents, even though I never set foot in it. Here, however, delivery of the key is more than a mere symbolical act, witnessing that possession has changed. The key is the instrument by virtue of which control of the warehouse and contents is enjoyed, and therefore with the key goes control, and consequently, possession. A further example of constructive possession arises when goods are delivered at a person's house while he is absent. Here, again, there is a real assumption of control, through the placing of the goods within property already in the acquiror's possession.

So far, we have considered possession as applying only to tangible objects, for the idea of *corpus* implies something having material existence, in respect of which physical control can be exercised. The idea of possession, however, has been extended to include intangible objects, so that trade-marks, copyrights, and servitudes may be said to be possessed, as well as owned. Such a possession is termed *incorporeal*, and may be defined as the assertion of power over, or the determination to enjoy, any intangible thing. For incorporeal possession, the two elements of *animus* and *corpus* are again necessary, but whilst the conception of *animus* requires no modification, *corpus* must be understood, with regard to incorporeal possession, as implying nothing more than the actual exercise of the power over, or the use of, the intangible thing, as incorporeal possession only exists so long as this power or use is enjoyed. As soon as it ceases, incorporeal possession ceases.

Possession is acquired whenever *animus* and *corpus* coincide, and ceases as soon as they separate. This may occur in three ways, by (1) Taking, (2) Delivery, (3) Operation of Law.

Taking is the act of acquiring possession without the consent of the previous possessor, if there has been one. Thus, where an innkeeper seizes the goods of his guest, who has failed to pay his bill, this is an acquisition of possession against the will of the previous possessor; but it is a rightful taking of possession. On the other hand, where a thief steals a watch, this is still an acquisition of possession against the will of the true owner; but it is wrongful, *i.e.* not in pursuance of a legal right. Another kind of Taking occurs when a man catches a wild beast. Here there has been no prior possessor. This may, therefore, be termed an original taking.

Delivery implies the voluntary relinquishment of possession

by one person, in favour of another. This may be actual, as where A delivers a book to B by way of loan, or constructive. In constructive possession, the person who is relinquishing possession surrenders that object through the agency by which control of the original object is secured, e.g. the key of a warehouse.

Transfer of possession by operation of law occurs when the law removes goods from the control of one person to the control of another. This occurs most frequently on death, when possession passes from the deceased to his personal representatives. But it must be noticed that transfer of *ownership* by operation of law does not necessarily involve a transfer of possession. Thus, the effect of bankruptcy is to transfer property in the bankrupt's goods to the trustee in bankruptcy, yet some of them at least remain within the bankrupt's possession.

Roman law recognised two degrees of possession—the first of these being mere *detentio* (or *possessio naturalis*) of the slave, *filiusfamilias*, bailee or agent, the other being termed *possessio* strictly, or *possessio civilis*. Of these, only the second gave rise to the special protection conferred by the Possessory Interdicts. The nature of the distinction between the two has provoked considerable discussion. Savigny, in his treatise *Das Recht des Besitzes*, put forward the view that the higher type of *possessio* arose only where the possessor held with a coincident claim either that he was the present owner, or hoped to become owner through the efflux of time. This intention has been termed the *animus domini*, or more recently, the *animus possidendi*. Jhering has attacked this view, pointing out that it does not explain all actual cases, and further, that the extracts from Paulus, upon which Savigny's view chiefly rests, are not supported by the opinions of other jurists, whilst the test given by Savigny is unworkable in practice. Jhering's own theory is that possession is protected because it has the *prima facie* appearance of ownership, the possessor having the normal powers of the owner with regard to the object. Accordingly, every one consciously exercising this degree of control over an object has possession, although in some varieties of it (*i.e.* when a person has *possessio naturalis*) the law has removed the full protection which it normally enjoys for some specific reason.

The general nature of possession in English law has been indicated in dealing with decided cases on the topic. It remains to notice that the possession of land came to be treated in a different manner from the possession of chattels. Our early land law attached the greatest importance to the enjoyment of that possession of land, which it termed *seisin*. This may be defined

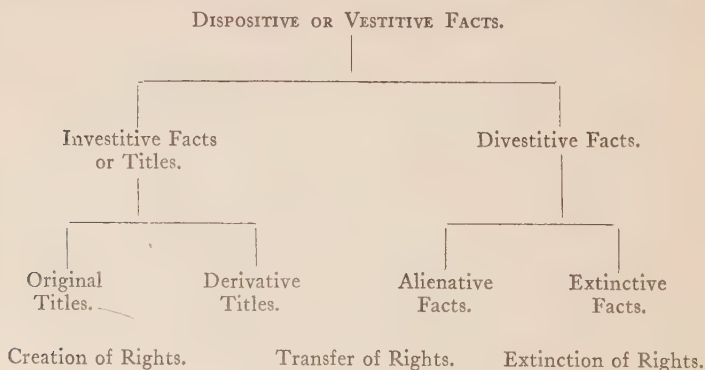
shortly as the feudal possession of it, and an early rule required that at any given moment there must be some person who stood seised of the land. Further, all transfers of seisin must be notorious, and it was usually effected by actual entry upon the land by the person who was acquiring seisin. The importance of this notoriety is best realised when it is remembered that the tenant who was seised of the lands enjoyed special rights in respect of them, and further, that it was found necessary at an early date to evolve a series of Possessory Actions, through which one who had recently been disseised was able to recover his lands again. Only a freeholder could enjoy seisin, and accordingly it is obvious that seisin and possession might, and frequently did, co-exist. Thus, where a tenant in fee-simple leased lands, the tenant was seised, whilst the leaseholder had possession. Again, possession might be evidence of seisin, as where a person occupied land, and then sought to establish a prescriptive title to it. But in modern England land law, seisin, as distinct from possession, is of little importance.

23.—DISPOSITIVE OR VESTITIVE FACTS

THE definition of the term “fact” is not free from difficulty. In the sense in which it is employed in Jurisprudence, it seems to mean any completed modification in the material order of things. In this sense it is contrasted with a thought on the one hand, and a thing on the other. Facts may be subdivided into Acts, *i.e.* movements of the individual will having consequences in the material world, and Events, which are either modifications in the material order of things effected without human intervention, or alternatively Acts of individuals other than that person whose rights and duties are being considered. Thus, an earthquake, the Battle of Hastings, and the striking of A by B are all facts, but while, from the standpoint of A, the earthquake and the Battle of Hastings are Events, the striking of B is an Act of A. On the other hand, from the standpoint of C, the striking of A by B is also an event.

Events, Acts, and Forbearances will be considered more fully in the next chapter. In the present chapter an attempt will be made to analyse that important group of facts, termed by Bentham Dispositive, and by Salmond Vestitive Facts, in virtue of which rights are created, transferred, and destroyed.

All dispositive or vestitive facts may be classified as follows :



An investitive fact is one in virtue of which a right becomes associated with a legal person. Thus, the capture of a wild

animal by A is an investitive fact, equally with a trust instrument, in virtue of which A becomes entitled to the sum of £10,000 a year. But, whilst the capture of the wild animal by A was an original title to the wild animal, the trust instrument was merely a derivative title to the sum of £10,000 a year. An original title is one which gives rise to a new right, additional to the sum-total of those already in existence. Before A captured the wild animal, no person had any right whatever with respect to it. By the act of capture, therefore, A has created an entirely new right. A derivative title, on the other hand, is one which, from the standpoint of the person considered, has existed before, but has resided in some one else. Thus, when the trust instrument was drafted, A became entitled to the sum of £10,000 a year, the right to which had previously existed in another.

Divestitive Facts are facts in virtue of which rights cease to be associated with some specified person. Thus, the conveyance of Blackacre and the burning of a work of art are alike divestitive facts, but whilst the former is an alienative fact, the burning of the work of art is an extinctive fact. An alienative fact is the complement of a derivative title. Thus, if A conveys Blackacre to B, the conveyance is an alienative fact from A's standpoint, and a derivative title from B's. An alienative fact is therefore one in virtue of which a right from the standpoint of one individual ceases to reside in him, and becomes vested in another. An extinctive fact is one in virtue of which a right ceases to exist *at all*. Thus, when A burned the work of art, the right to the work of art ceased to be vested in anybody, since the work of art itself had ceased to exist.

From the foregoing discussion, it will be obvious that vestitive facts might have been divided alternatively into those which are unilateral, *i.e.* requiring the exercise of the will of only one person (*e.g.* the capture of the wild animal or the burning of the work of art), and those which are bilateral, *i.e.* requiring the concurrence of two wills (*e.g.* sale of property). This would not be quite a complete division, however, for there are some vestitive facts which do not require the exertion of any human will. Thus, bankruptcy has the effect of transferring many rights from the bankrupt to the trustee in bankruptcy, whilst death transfers many more from the deceased to his personal representatives. By death, again, some rights are extinguished altogether. Such vestitive facts are the results of the operation of law, and are termed, more shortly, acts of the law.

In English law, still another division of vestitive facts is possible—into legal and equitable vestitive facts. The former are those which are recognised by law, the latter those which are

recognised by Equity. The divisions are not mutually exclusive, for a right may exist both in law and Equity. Purely equitable rights, however, receive no recognition in law—*i.e.* what constitutes a good vestitive fact in Equity is ignored by law, *e.g.* a trust.

The enjoyment of the more important classes of property in all systems of law has been protected by the definition of what constitute adequate vestitive facts in relation to them. Thus, in English law, certain classes of rights (*e.g.* copyright) can only be assigned by writing. Formerly, additional ceremonial was required. Thus, in Babylonian law, the code of Hammurabi enacts that the purchase of property must be embodied in written contracts, and properly witnessed. Failure of the purchaser to produce contracts and witnesses when called upon rendered him liable to the death penalty. Roman law recognised two modes of transfer—the formal and the informal. Full ownership to the more important types of property (*res mancipi*) could only be transferred by a formal public act—either a fictitious law-suit (*in jure cessio*) or a delivery of it in solemn form, with ceremonial words, before five witnesses and a balance holder (*mancipatio*). Transfers of less important types of property (*res nec mancipi*) and informal transfers of *res mancipi*—which gave *bona fide* possession only, and not *dominium*—were effected by *traditio*, or the handing over of the thing. But since a delivery of the thing may clearly occur for other purposes than for a transfer of property, the law required certain other factors: (1) the intention that property in the goods should be transferred, and (2) *justa causa*, *i.e.* some underlying motive for the transaction, or evidence of intention.

In early English law there was again the requirement of witnesses for a valid transfer of property, whilst modern English law requires the uncompleted intention to transfer property by way of gift to be evidenced by writing under seal. All systems of law require some special form to support the transfer of property upon a man's death, if such transfer is to be in accordance with his expressed intention. English law now requires the expression of intention to transfer to be included in a written document, signed by the testator at the foot, and witnessed by two persons who themselves receive no benefit from the dispositions contained in the document. (The Wills Act, 1837.)

24.—EVENTS, ACTS, AND FORBEARANCES

IN the last chapter the nature of Facts, Events, and Acts was discussed. It remains to notice that the failure to perform an act is an omission. When this failure to perform an act is intentional, *i.e.* when it is the result of a determination of an individual's will, it is termed a Forbearance.

Acts are the primary means by which law is set in motion. When an individual performs an act, it frequently involves him in legal responsibility. It is therefore necessary to analyse the term "Act" a little more closely.

Any human act must contain three elements in order that it may be recognised by law. There must be the exertion of a person's will, the consciousness in the person's mind of the exertion of that will, and the manifestation of the exertion of that will to the external world.

The exertion of the will may not be spontaneous. It may function as a result of the physical compulsion of the person willing the act, as when a man is compelled by blows and bodily injury to sign a document. Generally speaking, a man is relieved of legal responsibility for such an act. In this case, however, it should be noticed that the man has been compelled to will the act, and so it differs from a case where a man's body is forcibly compelled to perform such operation, *e.g.* where a man's hand is forcibly guided in making a signature. Here there is no will at all, since the guided hand is nothing more than the instrument of the stronger party, to the same degree that the pen is.

Again, the will may function as a result of threats of injury (*metus*). This is sufficient to relieve a man from civil responsibility, but the immunity in criminal law is more circumscribed. This is well illustrated by the case of *R. v. M'Growther*, in which the prisoner was compelled to join the Young Pretender's revolt as a result of threats of his landlord, the Duke of Perth, to burn down his house and drive off his cattle if he abstained. It was held that this was insufficient to excuse the commission of treason, and Lord Chief Justice Lee said :

"The only force that doth excuse is a force upon the person and present fear of death ; and this force and fear must continue all the time the party remains with the rebels. It is incumbent

on every man who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could.”¹

It has also been held that threats of injury to a man's wife and family are a good defence to a criminal charge.

In agreements, still less compulsion will serve to invalidate them. In Roman law, the acceptance of an inheritance through some degree of fear could be set aside by the Prætor, and in England, proof of “undue influence” invalidates contracts made as a result of it. Lord Chelmsford well defined “undue influence” in the case of *Tate v. Williamson* as follows: “Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.”² Akin to the rule of “undue influence” in contract was the presumption of English criminal law that a wife committing certain crimes in the presence of her husband did so through his compulsion, the wife, in consequence, escaping liability. This presumption could be rebutted by evidence proving that the woman had, in fact, acted voluntarily, but it has been abolished since 1925; although coercion may still be proved as a fact.³

Temptation influences the exertion of the will in a way differing from that in which duress influences it. Ordinarily, of course, temptation is no ground for absolving a man from the penalties attendant upon his acts. It has been urged, however, that overwhelming temptation, amounting to necessity, would have such an effect. The leading English case on this topic is *R. v. Dudley and Stephens*, in which the prisoners, being then in an open boat upon the high seas, killed one of their party, a boy, and ate his flesh, with the object of sustaining life until they were rescued. If they had not so supported themselves, all the occupants of the boat would probably have died. Lord Coleridge, in giving judgment, said: “It is not suggested that in this particular case the deeds were devilish, but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread, but to ascertain the law to the best of their ability and declare it according to their judgment; and, if in any case the judge appears to be too severe on individuals, to leave it to the Sovereign to

¹ Kenny, *Select Cases*, 56.

² (1866), L.R. 2 Ch. 55.

³ Criminal Justice Act, 1925 (15 & 16 Geo. V. c. 86), s. 47.

exercise the prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it. It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare the prisoners' act was wilful murder; and that the facts stated in the verdict are no legal justification."¹

It was noticed, when discussing the nature of juristic personality, that a juristic person could exert a will, apart from the exertion of the wills of the members, and possibly even distinct from the exertion of the wills of the majority of its members. Such exertions of its will, however, can only be realised in the consciousness of its members, and can only be manifested in the acts of its agents.

A lunatic may exert his will, and this exertion may have consequences in the external world, but he is not conscious of the exertion of his will. In other words, he does not *intend* the outward manifestations of his will-exertion, since his will is beyond his control. This has important consequences in all branches of the law, but more especially in the criminal law. In English criminal law, the test of insanity was elaborated in the replies of the judges, following the case of *R. v. M'Naghten* (1843).² Briefly, for insanity to be raised successfully as a defence to a charge of crime, it must be shown that at the time he committed the act, the prisoner was suffering from such an infirmity of the mind as to be unconscious of the nature and quality of the act he was doing, or, if he was conscious of its nature, that he was unconscious that he was doing wrong morally. As far as unconsciousness of moral wrong-doing is concerned, if he is conscious that the act was one that he ought not to do, and if that act is a crime, he is responsible for it. Lastly, where a man commits an act under an insane delusion as to surrounding facts, he is responsible to the degree that he would have been, had the acts been as he supposed them.

In the sphere of contract a lunatic is only immune from the consequences of his acts if the insanity is known to the other party.

¹ *Kenny's Cases on Criminal Law*, p. 64. (1884), L.R. 14 Q.B.D. 273.

² 10 Clark & Fin. 200.

In English criminal law, again, there is an irrebuttable presumption that an infant under seven years of age cannot be conscious of the nature of the act he is committing; and so he is completely immune from responsibility. An infant over seven and under fourteen years of age has only imperfect consciousness of the exertion of the will and its effects, and so there exists a rebuttable presumption that he was unaware of the nature of the act he was committing.

In Roman law, women and prodigals were at some periods considered to be imperfectly conscious of the quality of their acts, which were thus destitute of full legal consequences in the sphere of civil liability.

Drunkenness may temporarily suspend a person's full consciousness of the nature of his act. This would be sufficient to invalidate an agreement, but insufficient to excuse a crime. In *Rex v. Beard* (1920), Lord Birkenhead laid down three propositions with regard to drunkenness and criminal liability :

1. Drunkenness giving rise to insanity (even though merely temporary) is a defence to a criminal charge.
2. Drunkenness rendering the accused incapable of forming the specific intent required to constitute the crime must be taken into account in deciding whether or not he had this intent, and so deciding his liability.
3. "Drunkenness falling short of a proved incapacity to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts." ¹

The state of a person's mind may be affected by his ignorance or his mistake. It should be pointed out that ignorance consists in complete lack of knowledge of a thing, whilst mistake consists in supposing a thing to be other than it actually is. Ignorance or mistake may be of law, of fact, or of both. In practically all systems of law it has been found necessary to formulate the rule *Ignorantia juris neminem excusat*. Sir John Salmond elaborates three reasons for this : (1) That the law, in strict theory, is both definite and knowable. (2) That if some such rule were not evolved, the administration of justice would become almost impossible, through the difficulties involved in proving any person's knowledge of the law. (3) That the law is in most cases in harmony with the principles of natural justice. The

¹ (1920), L.R. A.C. 479.

second of these rules is considered with some fulness by Austin, and is probably the most important. The third has considerable historical colour, but is scarcely true of the complex systems of the present day. What, for example, are the principles of natural justice with regard to the maritime rules of general average, or the rule in *Shelley's Case*? In Roman law, it was occasionally recognised that certain persons could not be expected to know the whole of the law :

“Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. videamus igitur, in quibus speciebus locum habere possit, ante præmisso quod minoribus viginti quinque annis jus ignorare permissum est. quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur; et ideo sicubi non est delictum, sed juris ignorantia, non læduntur. hac ratione si minor viginti quinque annis filio familias crediderit, subvenitur ei, ut non videatur filio familias credidisse. Si filius familias miles a commilitone heres institutus nesciat sibi etiam sine patre licere adire per constitutiones principales, jus ignorare potest et ideo ei dies aditionis cedit.”¹

Ignorance of fact in Roman law usually had the effect of absolving a person from liability.² This is true also of English law as far as criminal liability is concerned, but in civil law, where the consequences of acts, and not the intention of the doer, is considered primarily, ignorance of fact frequently has no effect upon liability. In the law of contract, however, where it is necessary that there should be *consensus ad idem*, a mistake by one or both parties may be sufficiently fundamental to go to the root of the contract, and so prevent a true agreement. A mistake of this kind, termed “vital operative mistake,” makes the purported agreement void.³

Two elements of an act have now been considered—namely, the exertion of the will, and the consciousness of that exertion in the mind of the doer. There remains the third—the outward manifestation of the exertion of the will. This, in turn, has three stages: (1) The origin of the manifestation; (2) the circumstances of the manifestation; and (3) the consequences of the manifestation. The first stage may be briefly dismissed. It is always in the bodily or mental activity of the person committing the act. The origin is said to be in the mental activity when the act is foreseen and desired by the doer; the act is therefore intended. On the other hand, the origin is said to be in the bodily

¹ *Digest*, XXII. vi. 9.

² *Ibid.*

³ See *Foster v. Mackinnon*, L.R. 4 C.P. 704, *Cundy v. Lindsay* (1878), L.R. 3 App. Ca. 459, *Phillips v. Brooks* (1919), 2 K.B. 243, *Raffles v. Wichelhaus*, 2 H. & C. 906, *Couturier v. Hastie* (1856), 5 H.L.C. 673.

activity of the doer, when the act, though willed, is not foreseen and desired by the doer, *i.e.* when the intention is absent.

Both the circumstances and the consequences of an act are infinite. All acts are inseparably linked to all other acts by an endless chain, and any act is itself only the product of an infinite series of other acts. Even the origin of an act may be said to be undiscoverable, if we refuse to regard the mental or bodily activity of the doer as final, and look beyond these to the circumstances which caused such mental or bodily activity. Accordingly the law finds it necessary to fix artificial limits both to the circumstances and the consequences of an act. The chief purpose in considering the circumstances of an act is explanatory. They place it in definite relation to the material universe, and only those circumstances are considered, therefore, which are directly relevant to this end.

The chief purpose in considering the consequences of an act is to fix the doer's responsibility for them. Some limit must obviously be fixed to the responsibility of a person for the consequences of his acts, for these are endless, and even if the law only attached responsibility to those consequences which are discoverable, human action would be subjected to impossible restrictions. As a result, the consequences of an act are only taken into account if they result directly from the act, that is, if the chain of causation between the act and the consequence is unbroken; and further, a man is, in general, responsible only for the consequences which an ordinary reasonable man would have foreseen. In the English law relating to negligence, however, it has been established by the case of *In Re Polemis and Furness Withy's Contract*¹ that once the fact of negligence has been established, the defendant is liable for all the direct consequences of his negligent act or omission, even though a reasonable man would not have foreseen that the loss which occurred would ensue. Although this action arose upon a charter party, it seems probable that this extension of liability applies rather to cases of negligence than to the Law of Contract.

Finally, it should be noticed that acts may be wrongful either in their tendencies or in their actual results. Generally speaking, in criminal law, acts are wrongful on account of their tendencies, since they are regarded, as it were, from the standpoint of the wrong-doer. In civil law, however, acts are usually considered wrongful because of their actual results; that is, they are regarded from the standpoint of the injured party. Therefore, in most civil wrongs, actual damage must necessarily be proved. An exception to this rule in English law is the case of libel (but not

¹ (1921), 3 K.B. 560.

of slander), where proof of damage is unnecessary. The reason for this exception is historical. Originally jurisdiction in respect of libel resided in the Court of Star Chamber, and proceedings in respect of it, therefore, bore a criminal character even though they were in fact civil. Other rights which are actionable without proof of damage are those in respect of the person. Thus, an act which interferes with another's physical well-being, for example, an assault, is so actionable.

25.—INTENTION

IN the last chapter, the elements of an act were considered. Acts, however, may be either intentional or unintentional.

An intentional act is one committed with the foresight that it will have certain consequences, coupled with the desire, nevertheless, to perform the act. Unintentional acts are those committed without the foresight, and without the desire. It is therefore obvious that intentional and unintentional acts admit of sub-classification, for if I touch a vase on a pedestal, and knock it over and break it—

1. I may have foreseen that it would be knocked over and broken if I touched it, and desired still both to touch it and to break it.

2. I may have foreseen that it would be broken if I touched it, and have desired to touch it, but not to break it.

3. I may have foreseen that it would be broken if I touched it, and have desired neither to touch nor to break it.

4. I may not have foreseen that it would be broken if I touched it, but I have desired to touch it and break it (*i.e.* there is here no reflection whatever upon the consequences of the act).

5. I may not have foreseen that it would be broken if I touched it, and I have desired to touch it, but not to break it.

6. I may not have foreseen that it would be broken if I touched it, and I have desired neither to touch it nor to break it.

Two other theoretical possibilities, involving the desire to break it but not to touch it, where foresight may or may not exist, do not arise in actuality. Bentham observes: "If the act be not intentional in the first stage, it is no act of yours."¹

In the foregoing examples, which may be termed examples of Simple Intentionality (which again may be Premeditated or Unpremeditated), (1) may be considered as a wholly premeditated intentional act, whilst (6) is a wholly unpremeditated unintentional act. Of the remainder, (2) is premeditated and partly intentional, in that the act itself was fully intended and the consequences were foreseen, though not intended. Example (3) is a premeditated but wholly unintentional act, since neither the act nor the consequences was desired, even though the consequences were foreseen, whilst (4) is an unpremeditated, wholly intentional

¹ *Principles of Morals and Legislation*, p. 83.

act, and (5) is an unpremeditated, partly intentional act, in that the consequences were not desired, although the act itself was intended.

Unpremeditated acts are frequently termed impulsive. Thus, where A makes up his mind to murder B, and does so, this is a wholly premeditated intentional act; but where, during a violent quarrel, A draws a knife and strikes B, and kills him without thinking at all about the consequences of the striking, this is an unpremeditated act, which may or may not be wholly intentional. It is clear that in criminal law, at least, a higher degree of responsibility should attach to a person whose act is premeditated, than to a person whose act is unpremeditated, more especially where loss of life results. Accordingly, unpremeditated killing in English law constitutes the crime of manslaughter, whilst premeditated killing amounts to the more serious crime of murder.

Austin uses the terms Heedlessness and Rashness as applicable to some forms of Intention. He says: "The party who is guilty of Temerity or Rashness, like the party who is guilty of Heedlessness, does an act, and breaks a positive duty. But the party who is guilty of Heedlessness thinks not of the probable mischief. The party who is guilty of Rashness thinks of the probable mischief, but in consequence of a missupposition begotten of insufficient advertence, he assumes that the mischief will not ensue in the given instance."¹

Reverting to the example of the vase, examples (4) and (5) are both examples of Heedlessness, whilst example (2) illustrates what Austin means by Rashness.

Austin considers that the terms Intention and Will are not synonymous. He says:

"When I will an act, I expect or intend the act which is the appropriate object of the volition. And when I will an act, I may expect, contemplate, or intend some given event, as a certain or contingent consequence of the act which I will.

"Hence (no doubt) the frequent confusion of Will and Intention. Feeling that Will implies Intention (or that the appropriate objects of volitions are intended as well as willed) numerous writers upon Jurisprudence (and Mr. Bentham amongst the number) employ 'will' and 'intention' as synonymous or equivalent terms. They forget that intention does not imply will; or that the appropriate objects of certain intentions are not the appropriate objects of volitions. The agent may not intend a consequence of his act. In other words, when the agent wills the act, he may not contemplate that given event as a certain or contingent consequence of the act which he wills."²

¹ *Jurisprudence*, p. 427.

² *Ibid.* p. 421.

Austin's reasoning is good, even though the example quoted is not; for Bentham points out that an intention may relate either to the act or to its consequences, or to both. At the same time, the volition which sets matter in motion is clearly not the same as the desire and foresight with which that volition is initiated.

It should also be noticed that upon occasion, the law presumes an individual's intention from the consequences of his actions. So, where an individual intends to commit one crime and actually commits another, the law deems him to have intended that crime, although intention was in fact absent with respect to it.

With a few exceptions, to be considered shortly, Intention is irrelevant in discussing civil liability, since the civil law seeks primarily to remedy harm done, omitting any analysis of the mind of the wrong-doer. So, if A contracts with B to deliver goods on a certain day, and A does not, he is equally liable whether he intended to deliver the goods, or whether he intended not to deliver, or whether he merely overlooked the matter. Again, if A commits a trespass in respect of B's property, the state of his mind has no effect whatever upon his liability in tort. In crime, however, the general rule is that intention to do wrong is a necessary condition of liability. The question then arises, What degree of intention is necessary? It has already been shown that a premeditated intentional act may involve a higher penalty to the wrong-doer than an unpremeditated intentional act. Even of premeditated intentional acts, however, there are three possible varieties, as was apparent from the example of the broken vase.

Commenting on this point, Professor Kenny says: "Clearly, 'purpose' always involves the idea of a desire. So, also, in popular parlance does 'intention'; for a man is not ordinarily said to 'intend' any consequences of his act which he does not desire, but regrets to have to run the risk of (*e.g.* when he shoots at an enemy, though seeing that a friend is close to the line of fire). Yet in law it is clear that the word 'intention,' like the word 'malice,' covers all consequences whatever which the doer of an act foresees as likely to result from it; whether he does the act with the actual desire of producing them, or only in recklessness as to whether they ensue or not. The fact that he had means of knowing a consequence to be likely, raises a *prima facie* presumption that he did actually foresee it as being so. There is such a great difficulty in obtaining any evidence to rebut this presumption, as usually to render it practically equivalent to a conclusive one."¹

¹ *Outlines of the Criminal Law*, p. 148.

Reverting to the vase example yet again, Intention in the criminal law covers both (1) and (2), although only the former is in strictness wholly intentional.

Every intention has certain causes. Thus, if A kills B, the reason for A's intention may be that A is jealous of B, or that he dislikes his manner of living, or that he wishes to rob B. Each of these reasons would be a motive. Accordingly, Bentham defines a motive as "anything whatsoever, which, by influencing the will of a sensitive being, is supposed to serve as a means of determining him to act, or voluntarily to forbear to act."¹

A man may form an intention from more than one motive, as where a person steals a valued possession from one he hates. Here the intention is to steal. The motives leading to the formation of the intent are: (1) The desire to inflict pain upon some one hated, and (2) the enrichment of the thief.

One or two intentional acts involve the doer in legal liability, or additional liability, if done with an improper motive. An improper motive is one other than the specific motive attached by law to some particular act, as being the correct one. An improper motive is said to be a malicious motive, or, more shortly, Malice.

It must be noticed, however, that the term "malice" is unfortunately employed in law with a variety of meanings. Used in one sense, it means simply "an intention to inflict harm," and as such is a necessary element in all crimes. Again, in statutory wrongs of malice (*e.g.* malicious damage to property under the Malicious Damage Act, 1861),² malice signifies an intention to do the specific type of harm actually committed. Thirdly, in the phrase "malice aforethought," as applied to murder, malice here means an intention to kill, or to do an act intrinsically likely to kill. This is sometimes termed Murderous Malice. Here, again, malice amounts simply to intention to kill or to hurt dangerously. In the tort of malicious prosecution, however, malice means improper motive, that is, any motive other than the promotion of justice. So, if I bring criminal proceedings with the object of injuring the feelings of the accused, or in the hope that he will pay me to secure their discontinuance, the proceedings are in each case deemed to be malicious. Again, it is necessary to prove malice in defamation, when the occasion is privileged. Here, also, malice is equivalent to wrongful motive, and in this instance it means any reason for the misstatement other than that for which the privilege was established. The defendant "is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion

¹ *Principles of Morals and Legislation*, p. 98.

² 24 & 25 Vict. c. 97.

to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive.”¹

Another class of wrongful acts penalised by law is that termed fraudulent. It has already been pointed out that, from the standpoint of the person defrauded, it affects the exercise of his will. From the standpoint of the fraudulent party, however, fraud involves an intentional act, *i.e.* the utterance of a known misstatement. Intentional here includes a statement made recklessly, or without belief in its truth. But the essence of fraud is that the intention must be wrongful, the motive being irrelevant. This is well illustrated by the case of *Polhill v. Walter*,² in which the defendant was persuaded, in the interests of an absent friend, to accept a bill of exchange *per procuracionem* of the friend, knowing he had not his friend's authority to do so. He was held liable in damages for fraud, the Court holding that a corrupt motive was not essential for the commission of the tort.

Motive is particularly important in considering criminal attempts. Sometimes it happens that a man commits an act, fully intending that it should have a crime as its consequence, but through some intervening set of circumstances, no crime is in fact committed. If the act was sufficiently proximate to the crime contemplated, and if, in English law, the crime was an indictable one, the act constitutes a criminal attempt and is itself a crime. It is clear that the motive with which the act was committed is very important here, for a person may put his hand in the pocket of another with intent to give him something. Assuming this could be proved, there would be no attempt to steal, and therefore no crime. But if it were clear that the hand were inserted for the purpose of stealing, there is a criminal attempt. Further, it must be pointed out that mere preparation does not constitute an attempt. If A buys a box of matches, this is not an attempt to burn down B's haystack, nor is it if he takes a train to the locality in which B lives; for both these acts may have other explanations. But if A is caught kneeling down by B's haystack with a lighted match in his hand, this is clearly an attempt to burn down the stack, on the facts of the case; but it is still possible that A may have struck the match with another motive, *e.g.* to see his watch on a dark night, and although this would be an exceedingly rash act, it is still not criminal. It would seem, therefore, that the law, in punishing attempts, seeks, from a consideration of every surrounding fact, to establish that the motive of the accused was the commission of a crime; and if the act was then sufficiently proximate (*i.e.* so closely linked

¹ *Clark v. Molyneux* (1877), 3 Q.B.D. at p. 246. ² (1832), 3 B. & A. 114.

with the crime contemplated that the crime would have been committed had not the chain of causation been severed), then the attempt is punishable.

It may be asked, What is the position when A attempts to commit a crime which it is, in fact, impossible to commit, *e.g.* to steal from a pocket which is empty? Formerly in English law it was held that such an attempt would not be punishable, but now it is clear that such attempts are crimes—a conclusion which seems entirely logical, since to *the knowledge of the accused* the commission of a crime is possible, and his intention is therefore felonious.

26.—NEGLIGENCE

THE nature of negligence has provoked a good deal of discussion. It has been asserted by some writers that negligence is a condition of the mind, and as such, is opposed to wrongful intention. This is called the subjective theory of negligence. By others, however, it is asserted that negligence is a course of conduct, being contrasted with wilful or intentional wrong-doing. This is the objective theory of negligence. Actually, there is not such a conflict between the two views as would at first appear. The law takes no heed of a man's mind, except in so far as it expresses itself in material acts, and it is only when negligence (considered from the subjective standpoint) has resulted in acts occasioning damage, that the law takes notice of it. So, in discussing intention, no intentions were considered which were not realised, to some degree at least (even though incompletely, as in criminal attempts), in conduct.

Austin defines negligence as the breach by omission of a positive duty.¹ He thus distinguishes it from heedlessness and rashness, the nature of which have already been considered, and he adds that a person who is negligent omits to do an act which he is bound to do, because he fails to think of it. Austin's definition, though logically correct, is too narrow a basis for the attribution of liability in modern law, and heedlessness has also been included within it. As Professor Holland points out, negligence now covers "all those shades of inadvertence, resulting in injury to others which range between deliberate intention (*dolus*) on the one hand, and total absence of responsible consciousness, on the other."² In the vase example, given in the last chapter, I should be considered negligent in examples (2) and (5). In both these examples it should be noticed there are two common elements—the desire to perform the act, and also the absence of desire for the consequences. They differ in that in example (2), the consequences were foreseen, while in example (5), they were not foreseen.

Whilst the law has widened the conception of negligence from the standpoint just considered, it has narrowed it from another. Not all acts properly termed negligent are deemed to

¹ *Jurisprudence*, p. 426.

² *Op. cit.* p. 112.

be so in law, but only those where irresponsibility in respect of the consequences of the act has occurred where the law imposed a duty of carefulness. In other words, negligence in law is failure to take proper precautions in respect of the consequences of acts, where such precautions are required by law, or, as it is more usually stated, where a duty to take care exists.

This immediately raises the question, What standard of care is required by law? The answer is not the same for all systems. In old Chinese law, for example, the liability for unintentional acts was not far short of absolute. In other words, the standard of care required was the very highest of which a man was capable. Only if this degree of care had been shown, was a man exempt from responsibility. In Roman law, there were several standards, applicable to various classes of acts, and corresponding degrees of negligence. Thus *culpa*, or *culpa levis*, was failure to show *diligentia maxima*, that is, the care which a *bonus paterfamilias* would show in that transaction considered. *Culpa lata* was failure to use any reasonable care at all; whilst there was still a third degree of negligence, *culpa levis in concreto*, which was failure to use that care which that man ordinarily did in his own affairs. It is evident that this standard might be a very high one, exceeding *diligentia maxima*, if the man were exceedingly careful in his own affairs, or again it might be lower than mere *diligentia*, if he were ordinarily reckless in his affairs. But, in fact, *culpa levis in concreto* was not considered a standard lower than *culpa lata*.¹

In English law, a distinction must be drawn between civil and criminal liability. In the great case of *Coggs v. Bernard* in 1703,² an attempt was made by Lord Chief Justice Holt to introduce into English law the Roman standards of care; but after hesitation, the Courts rejected them, substituting the single test of the care imagined to be shown by the ordinary reasonable man in the situation actually considered. Accordingly, it may be taken as settled that English law now recognises no distinction between negligence and gross negligence as a ground of civil liability, although judges still sometimes employ the term "gross negligence," as though it implied a different degree of liability from that resulting simply from negligence;³ but as Baron Rolfe observed in *Wilson v. Brett*: "I said I could see no difference between negligence and gross negligence, that it

¹ Buckland, *A Text-Book of Roman Law*, p. 551.

² 2 Ld. Raymond, 909.

³ Thus, Lord Esher, M.R., in *Le Lievre v. Gould* (1893), 1 Q.B. 491: "No doubt the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence."

was the same thing with the addition of the vituperative epithet.”¹

In the criminal law, negligence is only rarely a ground for liability, since a guilty intention is usually required. In cases involving death or injury to a person, negligence is considered more seriously. The reason for such an exceptional ground of criminal liability is to be found in the anxiety of law adequately to safeguard human life. It is clear that for negligence to be a ground of criminal liability, however, it must be extreme. Thus, Lush, J., observes in *R. v. Finney*: “To render a person liable for neglect of duty there must be such a degree of culpability as to amount to *gross* negligence on his part.”² The precise distinction between civil negligence and the gross negligence of criminal law cannot be drawn with precision, and has provoked a good deal of discussion. Thus, in *Dixon v. Bell*,³ the defendant sent a girl of fourteen to fetch a loaded gun. As she was returning, she pointed the gun at a child, and shot it. He was held civilly liable for the injuries caused to the child. In the event of the child’s death, it has been asked whether the defendant’s negligence was so gross as to have supported a charge of manslaughter.

In an epigrammatic passage in the *Digest*, Paulus says: “*Magna negligentia culpa est: magna culpa dolus est.*”⁴ The second of these statements, as it stands, is as inaccurate in respect of Roman law as it is of English law. It has already been pointed out that negligence with legal consequences (*culpa*) is quite distinct from wrongful intention (*dolus*). What Paulus really means is that some forms of negligence are so gross as to be accounted in law as equivalent to wrongful intent, and therefore they raise a legal presumption of wrongful intent. Partly for this reason, therefore, the law sometimes visits extreme negligence with the same legal consequences as if the act was committed with wrongful intent; and it was to the legal consequences alone that Paulus was looking when he made this observation. Thus, in English law, an act done with the knowledge that it will probably cause death is held in law to be an act done with the intention of causing death. There are two other reasons, in addition to the one just mentioned, why the law should in some cases identify the consequences of extreme negligence with those of wrongful intent. The first is evidential; it is frequently extremely hard to tell the difference between the two, so that for convenience they are classed together with respect to their legal consequences. Again, some acts due to negligence are so gross

¹ 11 M. & W. at p. 113.

³ (1816), 5 M. & S. 198.

² 12 Cox, 625.

⁴ *Digest*, L. xvi. 226

in their essence that they deserve to be punished as severely as acts due to wrongful intent.

To certain cases in which the act of one person results in damage to another, the rule *res ipsa loquitur* applies. This may be interpreted to mean that, altogether apart from any analysis of the defendant's mind or conduct, the facts of the case speak for themselves, and raise a presumption of negligence, which the defendant must disprove if he is able. Thus, the rule applies where two railway trains of the same company collide, for railway trains, properly controlled, do not run into one another.¹ In *Britannia Hygienic Laundry Co. v. Thorneycroft*,² the rule was defined as follows: "Where you have the subject-matter entirely under the control of one party, and something happens while it is under the control of that party, which would not in the ordinary course of things happen without negligence, you may presume negligence from the mere fact that it happens, because such a thing could not happen without negligence."

A further point that arises with regard to negligence is that certain classes of persons may be held to have been negligent even though they had exercised all possible care. So, if a doctor uses all conceivable diligence, but occasions loss of life in consequence of his professional incompetence, he is held to have been negligent, for a person following a profession or trade is under an obligation to show to all in respect of whom he exercises his trade or profession that skill which is usually shown by persons following that trade or profession. The only negligence that can possibly exist here is when the person first embarks upon a profession or trade for which he is unfitted, and for this he is held liable. The same principle is also recognised in Roman law.

It is evident that when damage is caused by A to B, then :

- (1) The negligence of A may have caused the damage to B.
- (2) The negligence of B may have caused the damage to B.
- (3) The negligence of both A and B may have caused the damage to B.

Case (1) is what we have hitherto been considering. Case (2), in which B's own negligence is the cause of the damage, obviously does not involve A in any liability. Case (3) is an example of "contributory negligence." In Roman law, this was fully dealt with by the *Lex Aquilia*. Thus, where a person crossed a field set apart for throwing javelins, and was injured, he was held to have no right of action, when one of the persons exercising

¹ *Skinner v. L.B. & S.C. Railway*, 5 Ex. 787.

² (1925), 2 L.J.K.B. 237.

negligently struck him, and injured him, for his own negligence had contributed directly to the injury.¹ In English law, it is now clear that merely to establish that the plaintiff has been guilty of negligence leading to the damage does not disentitle him to recover. The defendant must go further, and prove that the plaintiff's negligence was the *immediate* cause of the damage.²

¹ *Digest*, ix. ii. 9. 4.

² See, on this point, *Tuft v. Warman* (1857), 2 C.B. N.S. 740, and *British Columbia Electric Railway v. Loach* (1916), 1 A.C. 719.

27.—OTHER BASES OF LIABILITY

IT now remains to consider two other bases of liability, not included with liability either for intentional acts or for negligence. These are: (1) Absolute Liability, and (2) Vicarious Liability.

I. ABSOLUTE LIABILITY

By absolute liability is meant liability attributed to a person, when damage is caused to another, but not through the intentional act or negligence of the first person. In modern law, such liability is exceptional. In undeveloped systems it is far more frequent, and indeed, the tendency in ancient law seems to be to attribute liability wherever some individual can be connected with damage. In Anglo-Saxon law, if a crime was committed within a hundred, the hundred was absolutely liable for the apprehension and conviction of the criminal. A faint relic of this type of liability is traceable in English law even to-day, in the provision of the Riot Damages Act, 1886,¹ which makes a police district liable to make good all damages to buildings done during the continuance of a riot. This is an example both of vicarious and of absolute liability. It is absolute because the liability is imposed in respect of events not subject to the control of the persons liable. It is vicarious, because persons other than the doers of the wrongful acts are made liable. In the present chapter, however, the term "vicarious liability" will be used where wrongful acts are committed by one person and liability is attributed to another, either exclusively or concurrently, and the term "absolute liability" will be employed for liability in respect of damage attributed to a person, when no other person, but some thing, has caused it.

Formerly, a man's responsibility extended to all property subject to his control. Thus, if an injury was incurred by another in consequence of a displacement of it, the owner was liable, even though he was in no way connected with that displacement. At the very least he forfeited the offending property. Thus, in Jewish law, the ox that gored was destroyed, and in Anglo-

¹ 49 & 50 Vict. c. 38.

Saxon law, the object with which an injury was inflicted on a person was forfeited to the State. The owner might also be subject to additional penalties. Frequently, he had to make compensation for the damage suffered. This liability was regarded as too wide, however, and was narrowed down considerably. In general, therefore, to-day, "inevitable accident" is sufficient to negative liability. An event is deemed to be inevitable when, from the standpoint of the person whose liability is being considered, it is neither an intentional act nor the consequence of his negligence.

Two things should be noticed in respect of this immunity. In the first place "inevitable accident" is not an ideal term. If I am riding a horse, and a boy explodes a firework under its nose, so that it bolts and injures some one, notwithstanding that I am a competent horseman, and have done my utmost to avert the injury, this is termed "inevitable accident." It is, however, anything but inevitable, for I could have avoided the incident altogether if I had not gone out riding, or if I had gone in another direction. Secondly, inevitable accident should be carefully distinguished from mistake of fact which, as we have seen, may also be a ground for immunity from liability. In mistake, the act is willed, although the volition occurs in consequence of a misapprehension which has influenced my mind. In "inevitable accident" there is no volition whatever in respect of the event which causes damage. If I pick up a book under the impression that it is mine, when in fact it is yours, I have willed the act of taking the book, albeit in consequence of a mistake; but if the wind blows down A's wireless aerial into B's back garden, this is an "inevitable accident," for A has not willed the fall of the aerial at all.

An individual's responsibility for inevitable accident in English law is now confined to liability for the acts of animals owned by him and liability for things considered to be dangerous by law, and kept by him upon his property.

As far as animals are concerned, there is a fundamental distinction between domesticated animals and those *feræ naturæ*. If domesticated animals trespass on the land of another, the owner of them is absolutely liable for the natural consequences of the trespass, unless the escape was due to the act of God, of some third person, or of the plaintiff.

Again, if such domesticated animals do damage to some other person without committing trespass to land, the owner is not liable unless the plaintiff can prove, either that the owner was negligent in controlling the animal (if he was, the action falls within the ordinary rules of liability for negligence), or that he

knew that the animal had a tendency to commit the injury concerning which complaint had been made; for the law presumes that it is not the general nature of domesticated animals to do damage to mankind; although by the Dogs Act, 1906, it was provided that the owner of a dog is liable for injuries inflicted by it on cattle.

As far as wild animals are concerned, the person who keeps animals *feræ naturæ* (i.e. dangerous wild animals) is under an absolute liability for the damage they do. Thus, persons keeping elephants and bears in captivity have been held liable for personal injuries caused by these animals, which escaped, even though all possible care had been taken to prevent it.

Roman law admitted the principle of noxal liability for the damage committed by a person's slaves or cattle. By this it is meant that the master had the option of paying damages or surrendering the instrument of the injury. As an interesting consequence of the association of the guilt with the object by means of which the injury had been done, the rule was established that liability followed the wrong-doer (*Noxa caput sequitur*). Thus, if a master sold a slave, who had committed injury, the liability to surrender or pay damages passed to the new owner. The same liability existed in respect of a man's children in his *potestas*. Here, however, the responsibility of the parent was vicarious. Another example of absolute liability in Roman law is furnished by the quasi-delicts *res dejectæ vel effusæ* and *res suspensæ*. In the first, a householder was absolutely liable for things thrown from his house, whilst in the second he was again liable, even apart from his negligence, for things suspended over the road, from his house, to a maximum of ten *solidi*.

A further type of absolute liability in English law arises in respect of the accumulation of dangerous substances, by a person upon his property. The general rule here is known as the rule in *Rylands v. Fletcher*.¹ In this case, the defendants authorised the construction of a reservoir on their land. In spite of the fact that there was no negligence in the construction of the reservoir, the defendants were held liable to the plaintiff, who owned a coal mine into which water from the reservoir had flowed through a disused shaft. The ground of this exceptionally wide liability is to be found in the fact that certain substances are considered by law to be inherently dangerous in their nature, and therefore any one who artificially accumulates such substances on his property does so at his peril. In other words, his act of bringing such substances on his land is potentially a dangerous one as regards his neighbours, and in respect of that potential

¹ (1868), L.R. 3 H.L. 330.

danger he is therefore held liable. The substances which fall within this class cannot be defined in general terms, but it may be noted that the class includes electricity, noxious fumes, and yew tree leaves (projecting over a man's fence, and eaten by his neighbour's horse with fatal results).

Although the liability is termed absolute, there are some occasions when damage results and responsibility does not attach. Thus, if the damage is the consequence of some unforeseen calamity, beyond man's control (*e.g.* lightning or flood), the owner is not liable. Such an occurrence is termed an "act of God." Again, where the damage is the consequence of the act of a third party, not authorised by the owner, which the owner could not have been expected to avert, by taking reasonable care, or where the damage is due to the act of the injured party himself, there is immunity from liability. Again, if the accumulation is for the joint benefit of the two parties, the injured party must establish the fact that the defendant was negligent. Finally, if the accumulation was ordered by statute, the author of it is only liable if he has been negligent in his control of the substance.¹

Fire is unquestionably a dangerous substance, within the class just considered, but it has been made the subject of legislation in English law. At common law, a man was liable, even for accidental fires on his property, if they did damage to the property of his neighbour. By the Fire Prevention (Metropolis) Act, 1774, however, it is provided that in the absence of negligence, a man is not liable for damage caused by fire on his land, unless he has lit it. Where fire results from sparks emitted from engines, the extent of liability depends upon the question whether the owner has authority to run the engine. Thus, in the absence of negligence, the owner of a railway engine was formerly immune from liability, since the engine was running on the company's land, and the outbreak of fire was accidental; but under the Railway Fires Acts, 1905 and 1923, a railway company is now liable for damage caused by fire resulting from sparks, when the damage is done to agricultural land or crops, if the compensation claimed does not exceed £200. If, on the other hand, the owner of the engine has no authority to run it (as where it runs on a public highway), the owner is absolutely liable for damage caused by sparks.

Finally, it remains to notice that the law imposes an absolute liability, to the same extent as in respect of dangerous substances, upon persons responsible for the custody of chattels which the law considers to be inherently dangerous—and for the same

¹ *Green v. Chelsea Water Works* (1894), 70 L.T. 547.

reason. On the other hand, if the chattel was not fundamentally dangerous in nature, but had become so through some defect in its structure, the person who sells, lends, or gives the chattel is under a duty to warn the recipient of any danger which is known to him, and if he fails to do so, he is liable, on the ordinary grounds of negligence. As far as more remote parties are concerned, the rule seems to be that the seller, lender, or giver is only liable (to the same extent as he is to the recipient) to those who were within his contemplation when he parted with the chattel.¹ But in both these cases the liability is for negligence, and is not absolute.

2. VICARIOUS LIABILITY

It may be taken as a cardinal principle of modern law that, in general, only the person who commits an act is liable in respect of it. In early law it was far otherwise. In the patriarchal age, if a member of clan A injured or killed a member of clan B, the members of clan A were collectively liable in respect of the injury. This is the basis of the blood feud. The kindred of the injured man cannot discriminate, in the attribution of liability, between the wrong-doer and his kindred. Similarly, in Anglo-Saxon law, an entire hundred was collectively responsible for crimes committed within its borders. Even in communities considerably more developed the idea is hard to eradicate. In Babylonian law, Hammurabi's code provides that if a builder builds a house carelessly, and it falls down, killing a son or daughter of the owner, the builder's son or daughter shall also be killed. This is an example of the strict application of the *lex talionis*. It is also an illustration of vicarious responsibility.

In Eastern systems of law, the same principle occupied an important place in the criminal law until very recently. It reached its fullest development in Chinese law, where the principle of absolute responsibility was also most prominent, and it formed the central principle upon which the criminal law was built. If a man committed a crime, he was primarily responsible, and it was the magistrate's first duty to apprehend him. If he had fled, and was undiscoverable, then the criminal's family were liable, in accordance with their proximity of relationship to the wrong-doer. If the family also fled, or were undiscoverable, then the village community, or the ward of the city in which the offender had lived, was liable. Failing the attribution of responsibility to these, then the magistrate himself, and his subordinates, were

¹ *Langridge v. Levy*, 2 M. & W. 519, and see Stephen's *Commentaries* (19th edn.), iii. p. 521.

responsible to the Imperial Government in respect of the injury. When Europeans came to China for purposes of trade, the Chinese officials attempted to apply the same principle of criminal responsibility to them, too. Thus, the Canton officials attempted on more than one occasion to hold the Select Committee of the East India Company personally liable for the homicide of a Chinese by a seaman on an English ship—even if that ship were not in the Company's service. This principle of responsibility was one of the main causes of European resistance to Chinese jurisdiction.¹

In Roman law, a *paterfamilias* was noxally liable for delicts committed by persons within his potestas, even though he had neither authorised nor known of the delicts. The liability did not extend, however, to crimes. Thus a *paterfamilias*, in addition to his liability for the delicts of his slave, was also liable for those of his sons and daughters. He had the option of paying for the injury caused, or surrendering the offender. The possibility of surrendering the daughter was obsolete in classical times, and the right to surrender a son had disappeared by the time of Justinian.

In English law, vicarious liability is now confined to the law of tort, and exists only in respect of the following classes of persons :

- (a) A husband for the torts of his wife.
- (b) A principal for the torts of his agent.
- (c) A partner for the torts of his co-partner.
- (d) A master for the torts of his servant.
- (e) An employer for the torts of an independent contractor employed by him.

Each of these examples of vicarious liability requires explanation.

(a) HUSBAND AND WIFE

The old theory of the common law was that "by marriage, husband and wife were one person, and that person was the husband." As a result of this, the separate legal existence of the wife practically ceased, and her property became vested in the husband. From this it followed that if the husband was not liable for his wife's torts, committed both before and after marriage, the injured party would be left without redress, since the wife had no pro-

¹ See further, Keeton, *The Development of Extraterritoriality in China*, vol. i. chaps. ii. and iii.

perty out of which to satisfy him. Towards the end of the nineteenth century, the position was altered by the creation of the married woman's separate estate in law, by the Married Women's Property Acts. Since she could now own separate property, it followed that she would now be able to satisfy claims for torts committed by her out of it. Accordingly, the husband is liable for his wife's ante-nuptial torts only to the extent of the property which he acquires through her by marriage (so that the injured party is now in no worse position than he would have been had the woman remained unmarried), whilst the wife is responsible, in respect of her separate estate, for torts committed by her after marriage; but since many married women still have no separate estate after marriage, the husband also remains liable. If a divorce or judicial separation occurs, the husband's liability is terminated, even if the tort was committed, or proceedings in respect of it were begun, before the divorce or judicial separation was effected.¹

(b) PRINCIPAL AND AGENT

Agency is a form of employment of one person by another, but as will be apparent shortly, English law has seen fit to attribute different degrees of liability to the employer, according to the nature of the service undertaken. In agency, the principal is liable, as well as the agent, for the torts of the agent, if the principal either expressly or impliedly authorises them, or if the agent commits the tort, and this is subsequently ratified by the principal. This degree of liability is in conformity with the maxim of the common law, *Qui facit per alium, facit per se*.

(c) A PARTNER FOR THE TORTS OF HIS CO-PARTNERS

Partners are liable, jointly and severally, for the torts of a co-partner, where the tort was committed in the ordinary course of the firm's business.² This liability conforms exactly to that of principal and agent, since each partner is deemed to be an agent of the others in the promotion of the firm's business.

(d) MASTER AND SERVANT

The liability of the master for the torts of his servant is wider than that of the principal for the torts of his agent. A master is

¹ *In re Beauchamp* (1904), 1 K.B. at p. 581; *Cuenod v. Leslie* (1909), 1 K.B. 880.

² Partnerships Act, 1890, ss. 10, 12.

liable for all the torts of his servant, provided that the tort was committed in the course of the servant's employment, whether the master authorised the tort or not, and even if the master expressly forbade the commission of it.¹ A servant must be carefully distinguished from an independent contractor, although it is clear that the line of distinction must sometimes be a fine one. Thus the relation may exist for a particular transaction, or where the services are given gratuitously. A servant is a person employed by another on such terms that he remains throughout the service subject to the control and directions of his employer in respect of the manner in which the work is to be done.

The origin of the exceptional liability of the master for his servant has provoked much discussion. It has been attributed to the liability which formerly existed in the master in respect of wrongs committed by his slaves; and again, to the difficulty of proving authorisation by the master, where the continuing relationship of master and servant exists. But in modern law, at least, the principle is firmly grounded upon the fact that a servant may be put, at the will of the master, in such a position in respect of other persons, that he may do damage, for which it is totally beyond his capacity to make reparation. Accordingly it seems just that the master, through whose authorisation the servant was originally placed in that position, should also be made liable.

(e) EMPLOYER AND INDEPENDENT CONTRACTOR

An independent contractor, like a servant, undertakes to perform services for another, but unlike the servant, he himself retains control over the manner in which it is to be performed. In this case, it seems clear from first principles, that since the employer has not control over the manner in which the work is done, he ought not to be made responsible for any illegality in the doing of it. At the same time, where an employer authorises an independent contractor to commit an act which is itself unlawful, it would seem that the employer should also be made liable, and this is actually the case.² Further, where the work done is of a dangerous character, or likely to be dangerous unless proper precautions are taken, the employer also is liable; and further, where the employer is specifically under a duty imposed by law to do work, and he delegates it, he remains liable.

Finally, it should be noticed that the relation of employer and

¹ *Limpus v. L.G.O.C.* (1862), 1 H. & C. 526.

² *Ellis v. Sheffield Gas Co.* (1853), 2 E. & B. 767.

independent contractor may change into that of master and servant through the exercise of control by the employer over the contractor's actions; and where this is so, the obligations of the employer are proportionately increased to those of a master.

PART III

THE ARRANGEMENT OF LAW

28.—METHODS OF ARRANGEMENT

IT was pointed out in Chapter I. that the function of Jurisprudence is to analyse and classify the general principles of law. The present part of the volume will accordingly be devoted to a consideration of the leading divisions of law, and to the manner in which they are arranged.

The Law of a State is usually arranged in accordance with one of three distinct methods. In the first place, the substance of the law may be classified in accordance with the sources from which it is derived; or again, in accordance with the forms it assumes; or lastly, in accordance with the topics to which it relates.

In arranging the law according to sources, attention is devoted mainly to the historical development of the law. Thus, in Roman law, it would be necessary to begin the classification with early customs, derived from the patriarchal condition of the early Roman tribes. In this way, we should eventually obtain a picture of the earliest Roman society, with its self-contained families as units, each family being controlled by the despotic *potestas* of the *paterfamilias*. It would also be necessary to consider the importance of the priestly order in interpreting the customary law. This would lead naturally to an account of the compilation of the XII. Tables, which is in turn the basis of the second great division of Roman law, the *jus civile*. Following an examination of this source, it would then be necessary to explain that the development of Roman civilisation, and more especially the increase of Roman commerce, during the era of the great rivalry between Rome and Carthage, made some modification of the strict rules of the civil law inevitable. Accordingly, we should have an account of the establishment of the *prætor peregrinus*, and an analysis of the methods by which he introduced his reforms. The Edict would receive consideration, and also the nature of the Prætorian remedies. Thus *bonorum possessio* would be compared in nature and effects with Quiritarian *dominium*,

and the two sources of legal rules would be viewed side by side, and the Edict followed to its final consolidation in the time of Hadrian. This in turn would lead to an explanation of the replacement of both the *jus civile* and the *jus honorarium* by the *jus imperiale*, after the establishment of the Empire, and the Imperial legislation would be traced down to the codification of Roman law by Justinian, after which the *Corpus Juris* becomes the sole source of law.

A similar method could be adopted in the arrangement of English law. The origins of the common law in early Anglo-Saxon custom could be traced and its extension by judicial decisions. This could be followed by an explanation of the inadequacy of the common law to give full protection to certain important classes of suitors (*e.g.* beneficiaries of uses, and mortgagors). From this we should proceed to an account of the origin and nature of the second great source of English law—Equity. Later, it would be necessary to examine the influence of the Law Merchant as a source of English law, and also the influence of religion. Last of all would appear a consideration of the only great source of new law in a modern state—legislation.

A second mode of classification would be according to the forms which the law assumes. Historically, sources and forms are closely connected. A new source of law usually gives rise to legal rules in a fresh form. The common law in its first stage appears in the form of custom, and later in the form of judicial precedents. Equity appears first in the form of decrees of the Chancellor, later in the form of equitable precedents, which in form are indistinguishable from legal precedents. The Law Merchant, as a source of English law, appears first in the form of mercantile usage, and later also in the form of judicial precedents. Legislation as a source has a statutory form. Now, however, the forms which a modern system of law may assume have the appearance of finality, and it would be possible to classify English law at the present day under the headings of Statute, Precedent, and Custom; but this arrangement would have little practical utility, since law tends each year to be more completely included in statutory form. Abroad, where codification has become the rule, it is practically the only form of law, judicial precedents and professional opinion occupying only a very subordinate position.

It will therefore be evident that neither of the preceding methods of arrangement is a satisfactory one; and therefore, whether for practical administration or for purposes of study, a third method of arrangement is now universally adopted—the division of the content of the law, according to the nature of the

topic studied. The main division, according to this method, is into public and private law. This corresponds to the twofold activity of the State in the preservation of order. In the first place, it provides an organisation for government and the repression of disorder. In the second place, it provides machinery, through which private persons may secure settlement of their own disputes. Wherever the State comes into contact with the individual, however (except as an arbiter in his disputes), questions of public law arise. Austin, it has been noticed, doubted whether public law was properly termed law at all, since the State could be subjected to no restraints in its relations with its citizens; but it has been demonstrated that so long as the law remains unaltered, the State regards itself as bound by it, as much as the private citizen, though it is free to change the law at any moment.

Both public and private law may be further subdivided according to topics. The nature of these distinctions will be considered in turn, but it will be convenient to set out the main divisions in the following table:

STATE LAW	{ Public	Constitutional.
		Criminal.
		Administrative.
		Ecclesiastical.
		Family.
	{ Private	Persons.
		Property { Real.
		{ Personal.
		Obligations { Contract.
		{ Tort (Delict).
		Procedure.

In the case of public law, it is also necessary to divide each of the subdivisions still further into substantive and adjective (or procedural), since the procedure in each case is distinct. It will also be necessary to say something of the international law, and of the position when the law of more than one state is applicable to a particular dispute (Conflict of Laws).

29.—CODIFICATION

BEFORE considering the main divisions of modern law, it is first necessary to point out the chief purpose of these divisions. It is clear that a proper classification of the content of law greatly assists both the student and the practitioner. The student finds rules arranged in orderly sequence; the practitioner is spared the necessity of searching through considerable portions of the law fruitlessly. At the same time, most classifications of law have as an ulterior object its presentment in the form of a logically coherent code, of which all peoples seem to have experienced the necessity at certain stages in their development. In the present chapter, therefore, something will be said of the nature of codification.

Law is an institution, the existence of which may seem so fundamental within a community as to make any discussion of its advantages or disadvantages academic. It is only by an appreciation of these, however, that improvement becomes possible.

The first point to notice with regard to a legal system is that its existence makes too great a reliance upon the abilities of its administrators unnecessary, by substituting the accumulated legal wisdom of generations for the opinions of its living expositors. Even the ablest human intellects are limited and fallible, and "the Law" accordingly represents a steady progression of legal ideas, through the acceptance of the true principle, and the ruthless rejection of the unsound. Legal development is a continuous process of modification to meet popular needs. The passage of time removes from Law all those defective rules which will not bear the sternest test of all—that of winning the approval of succeeding generations of lawyers, law-makers, and litigants. As Mr. Justice M'Cardie has said :

"The constant transformation of social, economic, and industrial circumstances is ever knocking at the gate of ancient formulas. . . . The law must be reasonably certain, but it cannot stand still. Inconsistency, moreover, is sometimes charged against the common law. We must, however, never forget the truth so well pointed out by Mr. Justice Wendell Holmes in his book on *The Common Law*, 'that the life of the law has not been logic but experience.' " ¹

¹ *The Law, the Advocate, and the Judge*, pp. 15-16.

Further benefits conferred by a system of law are certainty and impartiality. The two are necessarily associated. When the law exists only in the consciousness of its administrators, it is obvious that even in spite of their utmost efforts their interpretation of it will be unduly influenced by the prejudices of their own order. This was one of the main reasons which led to the demand for a codification of the law by the plebeians in Rome before the publication of the XII. Tables. Bad law may often be avoided, but uncertain law is a constant danger to the security of the individual. Until the downfall of the Empire in China in 1911, every magistrate had power to inflict punishment for offences unknown to the Chinese Penal Code. As a consequence of this the fundamental rights of the Chinese subject—to liberty and the enjoyment of his property—rested in the hands of the magistrates. Unquestionably, from the theoretical standpoint, justice would be best administered in a state in which a bench of judges, endowed with perfect wisdom, adjudicated disputes aloof from all external influences, fettered by no limitations, whether of statute, precedent, or custom. But since such an ideal state may not be objectively realised, all states have sought to elaborate a system of law to guide the judge in his decisions, without at the same time removing from him a limited discretion in the application of the rules of law to any particular case.

Notwithstanding the obvious necessity of a system of law within a community, and the benefits conferred by it, there exist in all systems certain defects. The most obvious defect of law is its rigidity. A rule of custom frequently requires centuries to change; the disinclination of the judges to alter a rule once established is notorious; while the process of legislation is not an easy one, and in most progressive communities, although the bulk of legislation increases each year, the pressure of public business tends to render the passage of any particular piece of legislation exceedingly difficult. Again, the rigidity is partly due to the desirability of certainty with regard to the law. This is particularly true of judge-made law. When a case has once been decided in a certain way, even though it eventually becomes manifest that it might have been decided in a better way, the judges will continue to follow that decision if it is evident that a different one would occasion considerable hardship to persons deriving their rights from the first decision.

A further defect of law is its complexity. This is due to the necessity of applying general rules to specific cases, with the result that innumerable distinctions become engrafted on the main principle, greatly increasing the volume of the law, and in some cases impeding its proper growth. More particularly is this evil

apparent in systems which, like the English, owe a good deal of their development to judicial precedents, for it must not be forgotten that these increase the complexity of statutes by progressive interpretation, as well as develop the common law through the addition of new precedents.

Closely connected with the defect of complexity is that of technicality. Although the Law presumes that the layman should know, not only the Law, but the whole of it, the fact remains that even trained lawyers cannot comprehend a modern legal system in its entirety. On the other hand, it is also clear that the difficult task of the administration of law must be left to a single professional class, in whose hands technicalities tend to increase.

The existence of these admittedly grave defects has led lawgivers of all ages to attempt to minimise them by re-stating the law, with obsolete rules and contradictions removed, in the form of a code. The early efforts at codification (*e.g.* Hammurabi's, *c.* 2000 B.C., and the XII. Tables) were fragmentary and unsystematic, but even these were regarded by contemporaries and successors as boons conferred upon the communities to which they applied. Famous above all other codes of the Ancient World, however, is that of Justinian. In a little over three years, the committees on law reform which he appointed completed a redaction of the statutory law of the Empire in the *Code*, and a similar redaction of the juristic literature of the classical period in the *Digest*. It was in this form that Roman law became the subject of exhaustive study in Europe during the Middle Ages and again at the Renaissance, and it is no exaggeration to say that without the labours of Justinian the "Romanisation" of the law of the Continent of Europe at the Renaissance would never have occurred.

Gibbon has denounced the Reforms of Justinian in no measured terms,¹ pointing out that the compilation of the *Digest* caused the Roman lawyers to cease using the works of the classical jurists themselves, and in this way it prepared the way for their ultimate loss. This would have been a valid argument had the codification taken place during the Golden Age of Roman Jurisprudence, when the works of every jurist of repute were eagerly read by his fellows; but in the sixth century, the science of Jurisprudence was dead. Lawyers preferred epitomes to actual works, and far from studying even the five greatest of the Roman jurists, Valentinian's Law of Citations had enacted that the legal profession should reduce the consultation of these to an arithmetical process, so that the opinions of a majority of these five should prevail, irrespective of the way in which the great jurists had

¹ *Decline and Fall of the Roman Empire*, chap. xlv.

arrived at their conclusions in any particular case. The fact that no jurist of the first or second rank had been produced for over two centuries indicates the barrenness of Roman law during that period. In compiling the *Digest*, equally as in compiling the *Code*, therefore, Justinian was reducing a huge mass of legal literature, much of it almost completely forgotten, to a small compass, and to a consistent form, making it truly representative of the law of the later Empire, and the secure foundation for the vast edifice of legal and philosophical speculation which has been raised upon it from the time of Justinian to the present day. It is not by any means clear that the classical jurists would have been preserved under any circumstances, and certainly the benefits of codified law would go far towards compensating for the loss sustained; and in any case, the *Digest* has preserved for us, in an abbreviated form, the works of several jurists who would otherwise be merely names to us. It is submitted, therefore, that Justinian's compilations were fully justified, and, indeed, it must be a bad code which cannot secure justification, for the benefits derived from reducing the law to manageable compass, and so securing a fresh start, are well-nigh incalculable.

It is important to notice that codification often has the effect of putting a nation's legal system in such a form that other nations may accept it either in bulk or with modifications. There is an attraction in the symmetry and logical sequence of topics which appeals to foreign law reformers. Hence succeeding generations of lawyers have recognised the greatness of Justinian's *Corpus Juris*, and this recognition has led to its acceptance as the basis of the law of France, Germany, and of other nations. So, also, the greatest of modern codes, Napoleon's *Code Civile*, has been adopted by most of the Latin nations, and by many nations of non-European civilisation (*e.g.* Turkey, Egypt, Persia, Siam, Japan, and China). Codification, therefore, ensures a fresh start in legal history, with rules reduced for a period to manageable compass again, and also stimulates the process of legal development abroad.

It may be asked, in view of the obvious advantages of codification, why this has never been attempted in England. It should be remembered, however, that English law stands apart from Continental legal development; and that Continental legal changes produce less reaction here than elsewhere. Again, English law seems definitely to prefer the slow evolution of law by the constant accretion of rule to rule rather than by the scientific analysis and exposition of principles petrified in a code. At the same time, the evils of unchecked and over-luxuriant development have been greatly curtailed since the middle of the nineteenth century by the expedient of codification of separate

branches of the law in a single comprehensive statute (*e.g.* the Companies Act, 1929, and the Larceny Act, 1916). So much of the criminal law has now been codified in this way that there would seem little objection to its further codification in a single document ; but it seems improbable, at any rate at present, that the remainder of English law will progress so far.

30.—PUBLIC LAW : CONSTITUTIONAL LAW

CONSTITUTIONAL Law, the first great division of public law, may be described as that body of rules which ascertains where sovereign power resides in a State, and which explains and describes the powers of the bodies and persons to which is delegated political power by the sovereign.

In an early society, in which an absolute monarch had authority to make what laws he chose, and in which he administered and enforced the laws in person, Constitutional Law would consist in one sentence only : " All political power is vested in the king." Societies are never found in which public institutions are so unified as this, and we have inherited from Aristotle a stubborn theory of the Separation of Governmental Power. This theory regards governmental power as divisible into three spheres, in accordance with the function which each part fills. Thus, in all developed political societies there exists one body which enunciates general rules binding on all members of the community. This is the Legislature. There is also the body which interprets and applies the law, or Judiciary ; and thirdly, the organisation which enforces obedience to the laws, or Executive. In the past, primary attention has been given in Constitutional Law to the study of the Legislature, in accordance with the view that the other two divisions of Government existed for the purpose of enforcing the rules laid down by the Legislature. Now, however, there seems a tendency to regard the process of Government from a different standpoint, and to see in the Legislature a vehicle for the purpose of arming the Executive with the necessary powers for carrying on the administration of the country—a function to which the Judiciary must also lend its assistance.

The theory of the Separation of Powers was worked out afresh in the eighteenth century by Montesquieu with particular reference to the English Constitution. It may be pushed too far, however, for in England, the Executive and the Legislature, as Bagehot¹ pointed out, are interdependent, and the heads of the Executive are also members of the Legislature. But the conception influenced the framers of the American Constitution to such an extent that special provision was made for a definite separation, with the result that a Federal Judiciary was established as the

¹ In *The English Constitution*.

interpreter and defender of the Constitution; and the American Congress possesses only legislative powers, with no control over the action of the Executive, at the head of which stands the President elected for a fixed term, who in turn has no power to compel the acceptance of legislative suggestions by Congress. Under such an arrangement, it is possible for serious deadlocks to occur. One of the most important in recent years arose when President Wilson signed the Peace Treaty, with the resultant acceptance of membership of the League of Nations by the United States—an arrangement which the Senate refused to ratify.

The fundamental distinction in Constitutional Law is between that which is written, and that which is unwritten. In practically all countries other than England, the Constitutional Law is now embodied in a single document, termed shortly, "The Constitution." This may be, and is, amended from time to time, but it remains a single, coherent document. In England, however, such a document does not exist. There is, in fact, no special Constitutional Law. The rules regulating the exercise of sovereign power in England are to be found in statutes, judicial decisions, and customs, just as other laws are. This, in turn, leads to a further important distinction between the English Constitution and those of many foreign countries. What are known as the "fundamental rights" of the citizen are abroad enunciated in the Constitution, by which they are "guaranteed." In times of emergency, the Executive may, and does, temporarily suspend the "constitutional guarantees." In England, the same rights may only be modified by express legislative enactment. In the United States, constitutional rights again are embodied in the Constitution, which may only be modified by a special procedure, difficult to call into operation. Here, therefore, it would seem that constitutional rights are just as secure as in England, if not even more so.

A further point must also be mentioned. Where a written Constitution exists, the term "unconstitutional" has a special significance. It implies that the act or measure denoted is at variance with the terms of the Constitution and therefore void. Thus, in the United States, the Constitution confers only a limited authority upon Congress to make laws. If Congress makes a law upon any topic outside these limits, it is void. No English statute can ever be void, however. It is always the duty of the Courts to enforce it. Accordingly, the term "unconstitutional" as applied to an English statute can only mean, at most, that in the opinion of the person employing the epithet, it is opposed to the spirit of the English Constitution, as manifested in its past development.

A further point of difference between the English Constitution and those of foreign countries is that whilst it is flexible, they are, for the most part, rigid. By this it is implied that Constitutional Law in England is changed in precisely the same way as any other law. The most comprehensive modifications in the Constitution may be effected by statute, as well as the most trivial alterations in the private rights of subjects. Historically, this is due to the fact that in England, the Constitution is unwritten, and is thus discoverable in ordinary rules of law. Where written constitutions exist, however, these represent the considered political consequences of the activities of the dominating section of some state, and they are embodied in a document which the framers attempt, more or less successfully, to place beyond the reach of popular caprice. Thus, the American Constitution may only be changed, on the proposal of two-thirds majorities of both Houses of Congress, or on the application of the legislatures of two-thirds of the States, ratified by the legislatures or conventions of three-fourths of the states of the American Union. Consequently, in a century and a half, the American Constitution has only been amended on a score of occasions.

Still another important distinction between English and foreign constitutional practice must be noticed. In England, only a very incomplete picture of the Constitution would be obtained if the recognised sources of law were alone consulted. Much of our most effective governmental machinery is not described in any statute or judicial decision, and would not satisfy the tests required for a legal custom. This is especially true of Cabinet Government and the relations existing between England and the Dominions. This has led writers to divide Constitutional Law in England into law properly so called, and other rules which Professor Dicey termed "constitutional conventions." The breach of these entails the application of no legal sanction. Indeed, the breach of many minor constitutional conventions would seem to involve no sanction at all, whilst as far as the more important ones are concerned, Professor Dicey points out that a breach of them will sooner or later bring the offender into conflict with the law of the land.¹ It is the existence of these latter conventions which differentiates the English Constitution so sharply from all others. Constitutional conventions exist of necessity in all countries. Of such are party government and the alternation of ministries which result from it; but these are conventions which may be altered or modified at will. No other country, however, leaves such fundamental topics as the relation of the Executive to the Legislature to convention.

¹ *Law of the Constitution*, p. 442.

Modern constitutions contain detailed descriptions of Cabinet Government.

The law of procedure in Constitutional Law does not require special comment. In England, constitutional rights are enforced in the ordinary way, through the ordinary Courts. In countries possessing a federal constitution (*e.g.* the United States) the enforcement of constitutional rights is the special province of the Federal Judiciary.

31.—PUBLIC LAW: CRIMINAL LAW

AS a separate department of the law of a State, Criminal Law is a late development. It has already been noticed that before the State existed, law was enforced by the individual whose rights had been invaded, assisted by his family and clan. When the infant organisation of the State comes into existence, its function is for a period persuasive only. It induces members of the community to submit their disputes to it for adjudication, and seeks to regulate the vengeance which the injured party and his kinsmen mete out to the wrong-doer. As yet, there is no conception at all that certain types of injury to an individual or his property may also be a threat to the security of the State. Compared with the firm and powerful organisation of the family, the State is far too weak to enforce even a collateral penalty upon the wrong-doer, still less to satisfy its own vengeance in priority to that of the person injured. This fact led Sir Henry Maine to the conclusion that "the penal law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds."¹ In support of this view, he points out that many offences which in modern law are regarded as crimes, were redressed in early Roman law simply as delicts, and that the whole conception of crime in Roman law was of very gradual growth, isolated threats to the security of the State being treated in special legislative enactments, and redressed by a procedure in which "the analogy of a personal wrong received was carried out to its consequences with absolute literalness, and the State avenged itself by a single act on the individual wrong-doer."² This vengeance was accomplished by means of a legislative act, condemning the wrong-doer to punishment. From this point, Maine traces the successive stages through which criminal law develops. The first step forward occurs when multiplicity of crimes, and also a growing sense of power in the State, compels the appointment of commissions of the governing body to inquire into accusations of crime; later, commissions, instead of being nominated for each

¹ *Ancient Law*, p. 379. The whole chapter should be read.

² *Ibid.* p. 382.

particular crime, were appointed periodically. The last stage is reached when the commissions become permanent (in Roman law, the *questiones perpetuæ*) and acts are defined in general terms as crimes, to each an appropriate penalty being appointed.¹

This view of the origin of the law of crime in a delimitation of certain private wrongs, or Torts, as also injuries to the State, has been attacked by Professor Jenks, who points out that primitive law does not recognise any divisions of wrong-doing. It admits only the root idea of a *wrong*.² This is unquestionably correct, and Sir Henry Maine would have been the last to deny it. His use of the term "Tort" was by way of analogy merely, to indicate that historically private vengeance came first; later, the State modified this to the exaction of a pecuniary penalty. Later still, the State inflicted punishment for an injury to its own interest.

This sketch of the origin of the criminal law will assist in clarifying the nature of a crime. This is defined by Dr. Blake-Odgers as "a wrongful act of such a kind that the State deems it necessary, in the interests of the public, to repress it; for its repetition would be harmful to the community as a whole."³ This is the traditional view of English law, and is justified by the early history of criminal law. On the other hand, Professor Kenny offers the following definition: "Crimes are wrongs whose sanction is punitive, and is remissible by the Crown if remissible at all."⁴

In this definition, it will be seen that Professor Kenny rejects the idea of a threat to the security of the State as a basis of demarcation between criminal and civil law. He is led to this conclusion by a consideration of the fact that some private wrongs are far more serious threats to the security of the State than some crimes. Thus, negligent mismanagement of the affairs of a great company and a breach of trust are civil wrongs, but they may produce far more serious misfortunes than the theft of some object of trifling value. Further, in England during the last century, important classes of private wrongs have also been made crimes, and innumerable petty offences have been created by statute. This is due, not to any uneasiness concerning the security of the State, but because it has been found by experience that these types of wrong-doing can be most effectively repressed in this way.

Further, crimes are not invariably moral wrongs. Most grave crimes are, although treason is an obvious exception.⁵ This test must therefore be rejected. Turning, therefore, to

¹ *Ancient Law*, p. 393.

³ *Common Law*, i. p. 104.

⁵ *Ibid.* p. 8,

² *Short History of English Law*, p. 14.

⁴ *Outlines of Criminal Law*, p. 15.

Professor Kenny's definition, it will be noticed that he first distinguishes crimes from other wrongs by the fact that their sanction is punitive. The primary object of instituting proceedings is not to remedy the harm done, but to inflict injury upon the wrong-doer. Again, the Crown in England cannot pardon the invasion of a private right. Only the injured party himself can do that. But the Crown can pardon a criminal, except in those few cases in which the prerogative of pardon has been removed by statute.¹ On the other hand, a private person cannot pardon a crime, even though he is a sufferer in consequence of it. The State may move at the instance of an injured person against a criminal, but it always retains complete control of the proceedings, and may continue them, even though the injured person has no wish to proceed.

These considerations prompt the suggestion that the conception of crime in modern society has changed. It is no longer an injury primarily directed against the security of the State, but any undesirable act, which the State finds it most convenient to correct by the institution of proceedings for the infliction of a penalty, instead of leaving the remedy to the discretion of some injured person.

It will be clear from the foregoing discussion that a crime may also be a private injury as well. In such a case, the private right of action is not barred by the existence of the State's right, but in certain grave crimes it is usually postponed until criminal proceedings have been instituted against the wrong-doer.

The manner in which the criminal law is enforced calls for some comment. It has been a feature of the development of Western societies that the criminal law has progressed far more slowly than the civil law. Thus, the criminal law of Rome maintained an indiscriminating brutality against the wrong-doer, right down to the time of Justinian. Similarly, English law until the beginning of the nineteenth century retained the death penalty for all felonies (except petty larceny), irrespective of the circumstances of the crime. This led to two important consequences, both of them seriously affecting the enforcement of the criminal law. In the first place, juries refused to record convictions, except for the gravest crimes, on the plainest evidence, since they were naturally reluctant to condemn a fellow-creature to death for a comparatively slight offence. On the other hand, the criminal who committed one felony did not scruple to commit another if the second assisted him to escape the consequences of the first, since the penalty was the same in both cases. Hence the bitter proverb: "It is as well to be hung for a sheep as a

¹ *e.g.* an unabated public nuisance,

lamb." Thus, the reform of the criminal law, with punishments in which some attempt is made "to make the punishment fit the crime," has resulted in a general decrease in serious crimes.

Under these circumstances, it will be profitable to consider the object of the State in the infliction of punishment. Its purposes have been classified as follows :

1. *Deterrent*.—This has been held by many writers to be the main, if not the sole, object of punishment. By the infliction of a penalty the State seeks to prevent the repetition of crime. This it may effect: (a) By removing the offender, temporarily or permanently, from society, and thus preventing him from enjoying the opportunity to commit another crime. This is effected by imprisonment or the death penalty.

(b) By operating on the wrong-doer's mind by terror, or by inculcating in him law-abiding sentiments, so that he lacks the inclination to commit crimes again. This is effected by painful punishments (*e.g.* flogging), or alternatively by careful regulation of prison discipline, in furtherance of the development of the prisoner's better qualities.

(c) By striking fear into the hearts of others, so that they refrain from committing crimes.¹

2. *Gratificatory*.—There can be no question that, in origin, punishment by the State was the inducement which led persons injured to renounce private vengeance. Even in recent times, eminent authorities, including Bentham and Sir James Stephen, have urged that modern criminal law includes this object among the purposes of punishment, and Professor Kenny finds confirmation of the view in the circumstances that modern tribunals frequently award a lighter sentence where the prosecutor does not press the case, or where the offence has been committed many years before.²

3. *Retributive*.—Many jurists regard the elevation of the moral sentiments of the community as a whole as an important object of punishment. That prevention is not the only object of punishment, Professor Kenny demonstrates when he points out that if it were, the incorrigible wrong-doer would not be punished at all, whilst a person who has succumbed to extreme temptation would be punished with added severity; when, in fact, the hardened criminal is punished more severely than one who falls through force of circumstances. This is due to the fact that society attempts to make the enforcement of the criminal law coincide to a considerable extent with the award of moral blame to individuals for wrongful acts. It has been pointed out already, however, that morality and the criminal law do not always coin-

¹ Kenny, *op. cit.* pp. 30-1.

² *Ibid.* p. 32.

cide. The divergence, in fact, tends to increase. Some moral wrongs, such as seduction, are not crimes at all, while many statutory offences can hardly be considered to be moral wrongs.

4. *Remedial*.—In all modern communities, the State directs that damage done by the crime of one person towards another shall be to some extent repaired. Thus, the thief must restore property he has unlawfully acquired. In some cases also, the Court may award a portion of the offender's property to the injured party in partial satisfaction of the wrong.¹ It is obvious, however, that all criminal damage cannot be repaired in this way. No one can restore a murdered man to life ; and for such reasons, therefore, all schemes of remedial punishment are admittedly incomplete. There remains a further question. The apprehension and trial of prisoners costs the State a considerable amount of money. Is it possible that the imprisonment of offenders can be utilised in such a way that the State may be repaid these expenses ? Formerly in England, the State derived a substantial revenue from the confiscation of the property of convicted felons ; but this has been abolished since 1870 ; and experience proves that a prisoner's employment fails even to pay for the cost of his detention.

The obvious mode of classifying crimes is in accordance with their seriousness. This course is adopted in continental systems, where the three divisions, *crimes*, *délits*, and *contraventions*, exist. Each of these classes of offence is tried before a different type of tribunal. In England, the same clear-cut distinction does not exist. English law recognises a fundamental distinction between indictable offences (*i.e.* those in respect of which a man has a right to be tried by jury), and non-indictable offences, in respect of which no such right exists. Indictable offences are again divisible into treasons, felonies, and misdemeanours. Of these, it is doubtful whether any real distinction exists between treason and felony, beyond the fact that the former is always a direct threat to the welfare of the State, and is thus regarded as being of extreme gravity.

The distinction between felonies and misdemeanours was formerly of extreme importance and still has practical consequences. All felonies (except petty larceny) were formerly punishable by death, whilst misdemeanours were never so punishable. Again, conviction for felony involved the forfeiture of the felon's property, a consequence which did not follow conviction for misdemeanour. Again, a person accused of felony could not be legally represented, nor call witnesses in his own defence, whilst a person accused of misdemeanour enjoyed both rights. These three dis-

¹ *e.g.* under the Forfeiture Act, 1870.

tinctions have now disappeared, but certain others still remain. Convicted felons are subject to some political disabilities until their sentence is served or they are pardoned. Thus, they do not enjoy the franchise, nor may they sit in Parliament, or hold any office or pension. Again, any one who, after a felony has been committed, reasonably suspects any person of committing it, may arrest him. This is not true of a misdemeanour. Where a felony and a civil wrong coincide, the felony must first be prosecuted, before civil proceedings in respect of it are begun,¹ whilst a misdemeanour may be pursued civilly or criminally at will. Further, no differentiation between parties to misdemeanours (or treasons, but this is because of the gravity of the offence) exists, but there are four classes of parties to a felony. Finally, a convicted felon may be ordered to pay damages not exceeding £100 in respect of proprietary losses caused by him; but this provision does not exist in respect of misdemeanours.²

In origin, there can be no question that felonies were regarded as the more serious crimes, to be severely repressed, whilst misdemeanours or trespasses were less grave wrongs, at one time closely associated with torts. Accordingly they still retain some marks of this earlier association; but the development of the criminal law by the creation of new crimes, was marked by abstention from enlarging the class of felonies, with their harsh consequences, with the result that the distinction on the grounds of the gravity of the offence is no longer a good one.

The topic of criminal procedure requires notice. In early times the State attempted to throw the responsibility for bringing the offender to justice upon the locality in which he lived, by a system of vicarious responsibility which has already been noticed. Even when this system of liability had disappeared, the State still left the preservation of order to the locality, which was under an obligation to furnish for this purpose a constable. Under such a system, crime flourished, almost unchecked, except by the efforts of the injured themselves, until, in the nineteenth century, the preservation of law and order was committed to an efficient and adequate police force. The mode of investigation of crime in England, however, exhibits appreciable differences from that prevailing abroad. In England, the initiation of criminal proceedings is still, in the first instance, at the suit of the injured party or his relatives. Failing such activities, the State itself undertakes inquiries with the object of fixing the crime upon some particular person, whose innocence or guilt then becomes the sole object of the resulting legal proceedings. In continental countries, on the other hand, the commission of a crime is normally

¹ *Smith v. Selwyn* (1914), 3 K.B. 99.

² *Kenny, op. cit.* pp. 91-7.

the starting-point of general inquiries or interrogations, during which all classes of persons may be called upon to make statements. At the conclusion of such inquiries, some specific individual is charged.

It has been pointed out that the State, in prosecuting a person for a crime, is really enforcing its own interest in its welfare against that individual. This resulted, in all systems of law, in the enjoyment of special rights by the State during the course of the trial. This is well illustrated by the position of a person accused of felony in English law, prior to the nineteenth century. Whilst the Crown might employ the ablest counsel, and call what witnesses it chose, the prisoner was allowed neither legal representation nor the right to call witnesses.

Again, nearly all systems of law seem to have admitted the use of torture upon persons accused of crime, for the purpose of extracting an admission of guilt. It was used in ancient Greek law, whilst the *Corpus Juris* of Justinian contains detailed provisions regulating its employment. Judicial torture was universal in Europe until the Reformation, and in some countries it only ceased to be an incident of legal procedure in the nineteenth century. The English common law never admitted the legality of torture, but it was a recognised method of trial in the Star Chamber. No instances of its use after the Restoration exist.

The position of the jury in criminal trials calls for some comment. The State, as we have seen, undertakes at once the apprehension, prosecution, and punishment of the offender. Its control over the trial, through a judge, is tempered, however, by the presence of twelve jurymen, whose unanimous decision is necessary before the prisoner may be declared guilty of an indictable offence. This right of the prisoner to have the judgment of his fellow-countrymen before his guilt is determined, originating in England and subsequently extended to almost every civilised country, is the subject's surest guarantee against arbitrary State action, and the history of the English Constitution illustrates with what stubbornness successive generations of British subjects, from Magna Carta to the Bill of Rights, have asserted the inviolability of this privilege.

32.—PUBLIC LAW: ECCLESIASTICAL LAW

ECCLESIASTICAL law may be of two kinds. It may be (1) the law regulating the establishment of religious bodies within the State; or (2) the law which one or more of those religious bodies exercises with the permission of the State.

I. THE LAW REGULATING RELIGIOUS BODIES

From the standpoint of general legal principle there is no more reason why the State should regulate the organisation of a religious society within its borders than it should regulate any other voluntary association. If a number of persons voluntarily unite together for the promotion of religious ends, their relations *prima facie* are regulated by the private law of contract, and the rules of the society are enforced upon members through the State's tribunals in the same way that the rules of a club are enforced. Historically, however, the connection between the State and religion is much closer than this. In the Middle Ages, Europe was regarded as a single State-Church, and each separate part of it was subject to a dual control. In the secular sphere, members of a political community, such as France or England, were subject to the control of the King and his Council; but in the sphere of religion, the community owed allegiance to the Church, represented in each part of Christendom by the ecclesiastical hierarchy of bishops and archbishops. At the Reformation, this theory of a united Christendom finally broke down, and in each country, whether Protestant or Catholic, the State assumed sole responsibility for the regulation of that variety of Christianity which the sovereign countenanced. In England, for example, after the separation from Rome, Parliament, in a series of comprehensive statutes passed during the reigns of Henry VIII., Edward VI., and Elizabeth, formulated the doctrines, and regulated the forms of public worship, of the reformed faith. These statutes have been amended from time to time, but the position of the Church of England remains unaltered. It is established by law as the official faith, recognised by the State, and to the decrees of the Church, if embodied in an acceptable form, civil sanctions are appended.¹

¹ *Marshall v. Graham* (1907), 2 K.B. 112.

As a result of this association between Church and State, the appointment of the clergy is regulated by statute,¹ and the clergy themselves possess a special status. Thus, no Anglican clergyman may be elected a member of the House of Commons, nor may he be compelled to serve on a jury. He is also excluded from participation in any trade or business. Bishops and archbishops are nominated by the Crown, and elected by the chapter of the cathedral church by virtue of a licence from the Crown. The extent to which the Established Church is autonomous (*i.e.* can vary the rules governing its organisation) must now be considered.

Before the Reformation, the organisation and doctrine of the Church were regulated by papal bulls and decrees of ecclesiastical councils. In respect of these, the English sovereigns claimed a power of veto, the extent of which was never determined with precision, and which manifested itself chiefly in a refusal to accept as an ecclesiastical dignitary any person distasteful to the monarch himself. After the Reformation, the regulation of the Church was admittedly the province of Parliament. It is true that the two ecclesiastical Convocations might eventually have been regarded as the appropriate bodies for suggesting reforms in Church Government, but these ceased to be active legislative bodies after the Restoration. Convocations exist for the provinces of Canterbury and York, and each contains an Upper House of bishops, and a Lower House of deans, archdeacons, and proctors. In 1919, however, the Church of England Assembly (Powers) Act conceded a certain measure of self-government to the Church. A National Assembly of the Church was constituted, comprising a House of Bishops, a House of Clergy (which includes all members of the two Lower Houses of Convocation), and a House of Laity, containing representatives of the laity, elected by Diocesan Conferences. The purpose of the National Assembly is to frame rules for the government of the Church of England, which will then be laid upon the table of both Houses of Parliament, and a vote will be taken upon them in each House after one day's debate only. Although the purpose of the Act seems to have been clearly to confer self-government subject to a nominal control by the Legislature, it is at least curious that the most important ecclesiastical Measure² (as these proposals by the National Assembly are styled) so far placed before Parliament has been twice rejected by the House of Commons, although the Measure when put forward a second time included important modifications, designed to meet the objections of the House of Commons.

At the Reformation, all subjects of the Crown were regarded

¹ The Clergy Ordination Act, 1804.

² *i.e.* The Prayer Book Measure.

as members of the Church of England, with the possible exception of Jews, whose presence was due to royal licence. Subsequently it became clear that large bodies of subjects refused to conform to the form of public worship established by law. These were known as Nonconformists, and for over a century were subject to some legal disabilities. By the Toleration Act, 1688, all dissenters except Roman Catholics and Unitarians were permitted to worship freely, and the disabilities on all Nonconformists have now been finally removed. They are free to organise themselves in whatever fashion they please, and the State only interferes if the practice of some particular form of religion constitutes a violation of the prevailing principles of morality. Thus, a religion incorporating human sacrifices would not only receive no countenance from the State, but even to-day would be actively repressed.

The position abroad is very similar to that prevailing in England, except that some other form of public worship (frequently Roman Catholicism) is established by law. In some countries, however, as in France since 1904, no form of religion is established, and all are therefore in the position of voluntary societies from the standpoint of the law.

2. THE LAW ENFORCED IN ECCLESIASTICAL COURTS

Ecclesiastical law may also mean that body of law which is enforced upon the members of a State through the ecclesiastical courts with the approbation and support of the State. This branch of public law has a long and interesting history. Before the Norman Conquest, all questions, lay or ecclesiastical, were decided in the same courts—usually the *tun*, hundred, or shire moots. After the Conquest, the lay and ecclesiastical jurisdictions were divided. All causes affecting the clergy, together with a number of matters such as marriage, the administration of the estates of deceased persons, and jurisdiction over the laity in respect of sins, were deemed to be within the jurisdiction of the Church. In strict mediæval theory, the Church Courts were in no sense responsible to the King, but only to the Pope, and they applied the Canon Law, a law built up upon the ruins of Roman law in the West, together with decrees of ecclesiastical councils, and modified by decrees of those councils, without reference to the temporal sovereign. The Constitutions of Clarendon (1164) established the position that ecclesiastical cases in England should not proceed further than the archbishop's court, beyond which there was a further appeal only to the King, whilst the Canon Law was only accepted and enforced in English ecclesiastical

courts with modifications, the extent of which is open to doubt.¹

At the Reformation, the ecclesiastical courts retained their jurisdiction, but the law applied was the Canon Law as it was then enforced in English ecclesiastical courts, together with any additions which might be promulgated by ecclesiastical synods. Further, there was now no question that the ecclesiastical courts were as much subject to the control of the State as the Common Law Courts and the Court of Chancery. From the sixteenth century onwards, however, the tendency was for the lay courts to extend their jurisdiction at the expense of the ecclesiastical courts. Thus jurisdiction in defamation and in actions for breach of promise of marriage was lost, and finally in the nineteenth century jurisdiction over the administration of the estates of deceased persons and in divorce was transferred (in 1857) to the newly established Courts of Probate and Divorce. Jurisdiction over the laity in respect of sins no longer exists, although it is still possible for proceedings to be taken against a layman in an ecclesiastical court for heresy. In practice, the chief surviving jurisdiction of the ecclesiastical courts is in respect of moral offences committed by clergy,² and the offences against the ceremonial and ritual of the Church, under the Public Worship Regulation Act, 1874. These latter offences are tried in the provincial court. There are three grades of ecclesiastical courts. The lowest is the archdeacon's court, now for all practical purposes obsolete. Above this is the court of diocesan bishop (or consistory court), presided over by the Chancellor of the Diocese. From this court an appeal lies to the provincial court of the archbishop, from which there is a further appeal to the Judicial Committee of the Privy Council.

¹ On this point, see *The Canon Law in the Church of England*, by F. W. Maitland.

² Under the Church Discipline Act, 1892.

33.—PUBLIC LAW : ADMINISTRATIVE LAW

THE term "administrative law" has three possible meanings, which must be carefully distinguished. It may mean :

1. The rules of law promulgated by an executive department, with the consent and by the authority of the central legislature.

In this sense, administrative law is nothing more than a form of delegated legislation, framed by a subordinate law-making body. Recently, in consequence of the vast increase of legislative activity in all states, this type of subordinate legislation has increased greatly in bulk. Moreover, legislatures, and especially Parliament in England, have shown a disposition to confer very wide powers of law-making upon a particular department of state. This growing practice has been regarded with much misgiving, since rules so framed are not subject to public criticism and modification in the course of their construction, as general statutes are. Thus Clause 120 of the Local Government Act, 1929, authorises the Minister of Health, in certain cases where difficulties arise under the Act, "to make such Order for removing the difficulty as he may judge to be necessary for that purpose"—a very loosely worded general permission. The practice of legislation by government departments is the more to be deprecated since departmental orders in some cases have not only denied to the subject his ordinary legal right to be heard, where infringements have been alleged, in the Courts, but have gone further, and denied him the right to be heard, even by the Department concerned. This question will be discussed further in considering the third meaning of administrative law.

2. Administrative law may also mean that particular part of public law which describes the nature of the activity of the executive department of the government in action. In this sense it may also be termed the law relating to Public Administration, and is a wide and somewhat formless subject. It deals with the organs of government in their relations with the subject, whereas constitutional law deals with the same organs from the standpoint of structure and their relations with one another. Thus, administrative law in this sense would deal with the way in which the revenue is collected, the relations of central to local government,

the government of colonies, and the promotion of the welfare of the citizens of a state.¹

3. Lastly, administrative law may denote that portion of a nation's legal system which determines the legal status and liabilities of all state officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced.² When the term is used in this sense, it is customary to retain the French designation of *droit administratif*, partly because the system seems to have its origin, in its modern form at least, in France, and partly because the French, probably through custom, expresses a good deal more than "administrative law."

Modern French *droit administratif* is derived from the system of public administration introduced by Napoleon, the primary object of which was the establishment of freedom of action for the State officials from the control of the ordinary courts. It is therefore based upon the conception that the State and its agents possess special rights over and above those possessed by private persons, and the determination and enforcement of these special rights is the province of a separate body of law, enforced in courts distinct from the ordinary courts of the realm. The system is also founded upon the continental interpretation of the doctrine of the separation of powers, in virtue of which it is deemed to be a fundamental condition of government that while the judges should be independent of the executive, the executive should also be exempt to a considerable extent from the control of the courts.³ As a consequence of this, a double system of law courts exists in France. These are the ordinary courts of first instance and appeal, determining civil suits between private persons, and punishing offences not of a political nature. Side by side with these are the administrative courts—the courts of the Prefects and the Council of State. These courts have no concern with private suits or ordinary crimes. It is their duty to adjudicate in all cases in which the interests of the State or of a State official are involved. Thus, if a private citizen has occasion to complain of the conduct of an official in his public capacity, he must have recourse to an administrative court. As Dicey points out, there is at least the possibility that the court will tend to protect the individual official so long as he is not doing more than carrying out the lawful orders of his official superiors,⁴ more especially as the judge will himself be no more than a judicial officer of the administration. Again, in reply to an action, it is open to the

¹ See further, Holland, *Jurisprudence*, pp. 374-8.

² Dicey, *Law of the Constitution*, p. 329.

³ Dicey, pp. 332-3.

⁴ *Ibid.* pp. 398-400.

French official to plead "act of State." This defence rests upon the theory that in certain spheres of activity, the official should exercise a discretionary authority, free from the control of any court whatever. If the official establishes that his action is within one of these spheres of activity, the suitor has no legal remedy.¹ The law which is administered in administrative courts is case-law, erected upon propositions deduced from the conception of the State as a specially privileged juristic person.²

It will naturally be asked, What is the position if both the ordinary courts and the administrative courts claim jurisdiction in a particular case? Napoleon reserved the settlement of these questions for the head of the State himself, but in practice they were decided by the highest administrative court, that is, the Council of State. Thus, there was a tendency for the jurisdiction of the administrative courts to increase at the expense of that of the ordinary courts.³ The Council of State itself was composed of high executive officials and its activities therefore tended to be political rather than legal. It is true that during the reign of Louis Philippe, many of the political functions of the Council of State were removed, but it never became a purely judicial body, and its decisions therefore tended to be moulded by administrative, rather than juristic considerations. Whilst the legal status of French Government officials sustained no substantial modification,⁴ in 1872 the power to decide disputed questions of jurisdiction between the ordinary and the administrative courts was transferred from the Council of State to a newly created Conflict-Court, which is far more decidedly judicial in character. At the same time Dicey was of the opinion that even this Court may occasionally be swayed by questions of policy in preference to rules of law.

The purpose of Dicey's account of *droit administratif* in France was to contrast it with the English "rule of law." In England we have only one set of courts—the ordinary courts of the realm, before whom the highest and the lowest, the private individual and the great Ministers of State, must all appear. Further, he declares, we have no rules at all analogous to the system of law elaborated by the French administrative courts. The English official must plead some defence recognised by the ordinary law of the land. If he cannot do so, he will not succeed. There is no such thing in English law as an "act of State," as applied to a British subject or to a friendly alien,⁵ whilst the plea of "official orders" does not relieve the individual official from

¹ Dicey, p. 386.

² *Ibid.* pp. 369–70 and 341–4.

³ *Ibid.* pp. 340–1.

⁴ *Ibid.* pp. 348–9.

⁵ See *Jobnstone v. Pedlar* (1921), 2 A.C. 262.

responsibility if he has infringed the right of a private citizen. This difference in point of view to be found in English law is admirably illustrated by the case of *Bowles v. The Bank of England*.¹ Bowles owned securities at the Bank of England from the income on which the Bank was in the habit of deducting the income-tax, which it remitted to the Treasury. The financial year expired on the 31st March 1912, but the Finance Act for the ensuing year did not receive the Royal Assent until August. During this interval Bowles contended that the Bank had no right to make deductions of tax on behalf of the Government, and the Court upheld his claim. It is obvious that a situation might arise in which the Government might be seriously embarrassed by this absence of authority to levy taxes; nevertheless, they could not contend state-necessity, since this is a defence unknown to English law. To avoid the difficulty in future, it was necessary to pass the Provisional Collection of Taxes Act, 1913, giving the Government authority to levy money for a limited period on the strength of financial resolutions of the House of Commons.

It is certainly true that in England public officials enjoy no special legal protection, compared with the ordinary citizen. Yet it is not by any means established that Dicey's further proposition, that in England the private citizen receives a completer legal protection against the official than he does abroad,² is free from objection. Even Dicey admits that the increased jurisdiction of the Council of State (which still remains the highest administrative court, although its power to determine conflicts of jurisdiction has been removed) has been directed towards the elaboration of new remedies for the private citizen in face of arbitrary administrative action; and he remarks: "No Englishman can wonder that the jurisdiction of the Council of State, as the greatest of administrative courts, grows apace; the extension of its power removes, as did at one time the growth of Equity in England, real grievances, and meets the need of the ordinary citizen."³

Other critics have gone further than Dicey; and it has been pointed out by an eminent authority that in German law the official is responsible in the ordinary courts for wrongful acts affecting the citizen, whilst even in the administrative courts there is no hint of a bias in favour of the official, nor is administrative expediency substituted for legal principle. In fact, it can be contended that the object of administrative law, as at present enforced on the Continent, is to protect the citizen against administrative encroachment.⁴

¹ (1913), 1 Ch. 57.

² Dicey, p. 389.

³ *Ibid.* p. 396.

⁴ See Sankey, L. J. (citing J. H. Morgan), in "The Principles and Practice of the Law To-day," *The Solicitors' Journal*, 17th and 24th March 1928.

It is certainly true that Dicey's view of the "rule of law" in England requires modification to-day, and it is quite probable that his view of *droit administratif* is equally in need of restatement. Possibly Professor Dicey's view of the English Constitution in the nineteenth century was not fundamentally different from Burke's in the eighteenth, as far as its theoretical perfection is concerned. The "rule of law" receives additional modifications each year, and it is possible that we are in some danger to-day of incorporating into English law the more objectionable features of *droit administratif* without its attendant benefits.

There were some signs of a change in English law before 1914. There was a tendency to establish special tribunals, containing technical experts, to deal with special types of governmental activity—for example, under the Workmen's Compensation Acts, the Public Health Acts, and the Factory Acts. A good example is furnished by the Coal Mines Regulation Act, 1887, s. 45 of which authorises the Secretary of State to direct an investigation to be held into the causes of a colliery explosion, by a competent person, assisted by assessors with legal or special knowledge. Again, Parliament has shown a plain disposition to confer a power to make laws in the form of departmental orders upon the executive, and in a number of instances the power conferred has been sufficiently wide to permit the department to exclude the jurisdiction of the courts, in respect of such orders, in favour of a nominee of that department. Now, on the Continent, the form of procedure adopted is a matter of general administrative law, and conforms invariably to the dictates of fairness. In England, however, the further power to settle the form in which complaints arising under the order shall be made has been assumed by the executive, which thus becomes the sole judge whether its requirements have been satisfied. The classic case illustrating this development is *Local Government Board v. Arlidge*,¹ in which the owner of a dwelling-house appealed to the Local Government Board against a closing order, made by a local authority. The Board directed an inspector to hold a public inquiry, following which the inspector made reports to the Local Government Board, which dismissed the appeal without permitting the appellant to be heard by the member of the department to whom it was remitted, and without informing the appellant of the contents of the inspector's report. The House of Lords was compelled to hold that in virtue of the order, the appellant had no right to be heard by the Board, nor to any knowledge of the inspector's report.

During the war this tendency towards limitation of the juris-

¹ (1915), A.C. 120.

diction of the ordinary courts in favour of special administrative courts was greatly increased as a result of the Defence of the Realm Acts, under which authority was conferred on the King in Council or on a Minister, in the very widest terms, to make regulations for the security of the realm, the enforcement of which was committed to specially created tribunals. The extent of the powers conferred under these Acts was well illustrated in *R. v. Halliday*,¹ in which the appellant, Zadig, a naturalised British subject of German origin, was interned by an Order of the Home Secretary, acting on the recommendation of the Aliens Advisory Committee, under Regulation 14B of the Defence of the Realm Regulations, 1914, although Zadig was charged with no offence, nor had he been accused before the Aliens Advisory Committee of any conduct in the least likely to endanger the safety of the realm. His only possible legal remedy was to attempt to show that the regulation was *ultra vires* as regards the Act of 1914—but the terms of the Act were so wide that this was impossible.

Two other cases, decided shortly after the war, merit notice, as illustrating the same tendencies. In *Chester v. Bateson*,² a government department published a regulation prohibiting under penalties a subject who had been dispossessed of premises from taking proceedings in a law court to recover them. The Court held this regulation bad, on the grounds that a subject who seeks the protection of the courts must not be exposed to the risk of fine and imprisonment for doing so. Again, in *ex parte O'Brien*,³ a government department, after committing obvious illegalities, attempted to legalise them by a special Order in Council *ex post facto*.

A series of recent Acts of Parliament have increased the number of departmental tribunals, and multiplied their functions. For example, under the Profiteering Act, 1919, the Board of Trade is empowered to hear complaints and to compel a seller to pay excess; under the Unemployment Workers' Dependents Act, 1921, the jurisdiction of the court is completely ousted, and the decisions of the Ministry of Labour are final; so also are the decisions of the Minister of Health under the Town Planning Act, 1925. The Mines (Working Facilities and Support) Act, 1923, provides that a party may only appeal to the Railway and Canal Commission when the Board has decided there is a *prima facie* case.⁴ Finally, the Local Government Act, 1929 (section 120), empowers the Minister of Health to make what regulations he thinks fitting for putting the Act into effect.

It is possible that the provisions of these Acts voice an uncon-

¹ (1917), A.C. 260.

² (1920), 1 K.B. 829.

³ (1923), 2 K.B. 361.

⁴ For these and other examples, see Sankey, L. J., *op. cit.*

scious criticism of our judicial institutions and vaguely hint at a remedy. It is possible also that the expense of modern litigation results in much injustice passing unchallenged, and that "the law's delays" may be avoided in the routine of a government department; but it is apparent that administrative tribunals in England are not by any means free from criticism, and the problem resolves itself, therefore, into a consideration to what extent the evils of the system can be minimised.

In the first place, it is desirable that Parliament should exercise an increased control over the Orders which it permits the executive to make. At the present time, Orders, when framed, are laid on the table of the House of Commons, and are enforced unless objection is raised to them. When it is remembered that the bulk of departmental legislation is vastly in excess of statutory legislation, it is apparent that few members have either the time, the inclination, or the necessary technical knowledge to examine these rules critically. The establishment of a standing committee of the House might do something towards controlling the Orders, especially if persons whose interests were affected by the Orders were permitted to appear before it. Again, Parliament should define with greater precision than it has recently been in the habit of doing the extent of the authority it delegates; whilst the department itself should evolve a proper procedure for the framing of rules. At present, it is said, the whim of a minor clerk may quite conceivably become the law of the land through a Statutory Order.¹ Finally, it should be laid down, as a rule of unvarying authority, that when a government department acts judicially, the fundamental forms of justice should be observed. More especially should it be established that a complainant has the right to present his case orally; whilst the possibilities of appeal from a Minister's decision to the High Court might well be increased. Of these very necessary modifications, however, there is as yet but little sign.²

¹ Sankey, L. J. (citing Sir H. Slessor), *op. cit.* p. 11.

² English literature on Administrative Law is growing rapidly. The student is referred particularly to *Justice and Administrative Law*, by C. H. Robson, to *Administrative Law*, by F. J. Port, and to *The New Despotism*, by Lord Hewart.

34.—FAMILY LAW

HISTORICALLY, family law is on the border-line between public and private law, although to-day it is almost invariably considered as a branch of private law. Family law, administered by the *paterfamilias*, preceded the birth of the State, and is therefore older than all public law. Later, the State assumed control of an individual, even in his relations with his family, but the process was gradual. Even to-day, however, it may be contended that the individual, in providing for the support and control of his family, is fulfilling a semi-public function. This, at any rate, was the view of Austin, who considered commands by a parent or guardian, given in the fulfilment of legal duties, as a part of positive law;¹ from which it follows that the giver of those laws is himself to this extent a subordinate law-making authority; and his relations with the central government are therefore a question of public law.

An excellent picture of the administration of family law in early society is to be found in the Biblical account of Abraham and his household. The family may be, and usually is, polygamous in structure, offspring of a bondwoman being accounted members of the family as well as offspring of the wives. The power of the father over his wives, children, flocks, and herds is absolute. If he sacrifices his son, there is no earthly authority to call him to account, whilst he can cast out his other son, Ishmael, into the wilderness, and command his herdsmen to desist from quarrelling with those of his neighbour and relative over pasturelands. The only limitations on this despotic authority are those which are derived from the force of old-established customs, which the head of the family feels himself powerless to modify. This is particularly important in matters of succession. Whilst the family property is within the control of the father throughout his lifetime, he is regarded rather as the administrator of it for the common benefit, than as the owner of it. At his death, it passes automatically to his children, either equally, or with the reservation of a special portion to the first-born. Further, the father could not alienate property during his control of it to defeat the expectations of his children. In some systems of law (*e.g.* the Babylonian) there is evidence to show that in the early

¹ *Austinian Theory of Law*, pp. 43-4.

days, the concurrence of the children was required for all considerable alienations of property.

In the next stage of society's development, the State exists as a supreme governmental body, but it is not yet sufficiently powerful to penetrate the corporate unity of the family. This stage is well evidenced by early Roman law. Again there exists the idea of the family as an organised unit, under the control of the *paterfamilias*. The power of the father lasted throughout his lifetime, irrespective of the age of the son. It existed only in regard to family affairs and private law, for a son subject to parental power could occupy any public office. The power extended as far as the life or death of the son. At the birth of the child, the father could determine whether he would rear it or not. He could also take away the life of his offspring for what he regarded as sufficient cause. The son could be sold into slavery, or pledged for a debt, or noxally surrendered for an injury he had inflicted on another. Legal development was surprisingly slow to check the exercise of these supreme powers. Throughout the Republic, the only restraint on the power of life and death was through the intervention of the Censor. In the classical law the slaughter of a son, except in pursuance of a formal family judgment, was forbidden, whilst under Constantine, any killing of a son became parricide.¹ Selling into slavery early fell into disuse, but noxal surrender for wrong-doing survived down to Justinian, whilst the power of correction was reduced to reasonable chastisement.

These exceptionally wide powers were not enjoyed in Rome by every parent, but only in general by those whose children were born in civil wedlock. The old Roman marriage was a formal ceremony, symbolic unquestionably of an earlier and cruder state of affairs, to which the legend of the Rape of the Sabines bears indirect testimony. There were two formal modes of contracting a civil law marriage—*Confarreatio* (possibly symbolic of marriage by capture) and *Coemptio*, which undoubtedly symbolises marriage by purchase, although whether it was a purchase of the wife by the husband, or a mutual purchase of husband and wife, as the name seems to suggest, is much disputed. Later, a third form of marriage became common—*Usus*, or marriage based on the fact of cohabitation with the intention to establish the status of husband and wife. This last form of marriage was plebeian in origin, but it speedily superseded the other two, since they automatically produced important changes in the position of the wife. On marriage, she separated finally from her own family, and entered that of her husband, with the status of a daughter.

¹ Buckland, *A Text-Book of Roman Law*, p. 103.

She was bound to render him obedience, and any property she might possess passed absolutely to him. As this subjection of wife to husband proved incompatible with the changing morals of the Roman people, a method was devised to avoid it. It was established by custom that if two persons married by *usus*, and the wife absented herself from her husband's roof for three nights during the year, she remained a member of her own family, and thereby escaped her husband's control, or *manus*. So popular did this marriage without *manus* become, that the other three modes became obsolete for practical purposes long before the end of the Republic. But marriage in this form was sufficient to give rise to *patriapotestas*. Apart from these civil law modes of marriage, there existed *matrimonium jure gentium*, which was recognised as a permanent union, but did not give rise either to *patriapotestas* or to *manus*.

Every Roman family possessed a special cult, which survived as a ritual for some time after religious belief in it had passed. Partly for this reason, the Roman citizen seems to have had a rooted dislike for childlessness, since this implied that his family cult would be neglected. It was open to him, therefore, artificially to extend the boundaries of his family by Adoption and Adrogation. By virtue of the former, a person was transferred from the control of his natural father to that of the Adopter. The tie between the child and his natural family was finally broken, and he entered his adoptive family in all respects as if he had been a natural-born son. The consequences of Adrogation were the same, but here the person who entered into the power of another had not previously been subject to the control of a father or remoter ascendant. Adoption could also be carried out by persons already possessing natural-born children.

It is also probably due to the same dislike of dying without making provision for the maintenance of the family cult that we have the surprisingly early institution of the will in Roman law. At first it seems to be inconsistent with the idea of the family as a closely organised unit, and the allied conception of the vested shares of the children in the family property, that a man should be able to dispose of his property freely on his death. The most probable explanation of the anomaly, however, is either that a man was able to make provision in this way for the family cult in the event of his dying childless, or alternatively, that a man could allot in this way some special portion to a favourite son. In either case, as Maine points out, while the modern will is secret and revocable, the earliest Roman will was a solemn public act, taking effect finally from the moment when the transaction was complete.

Whatever may have been the reason for the introduction of the will, it is clear that it is not regarded as a convenient device in virtue of which children may be deprived of their shares of the family property. Both custom and, in the classical period, legislation demanded that a certain fraction (which became known as the *pars legitima*) should always be reserved to a man's issue, unless they had been guilty of such conduct as to be unworthy of the property, in which case they ought to be specifically disinherited. Failing such provision for descendants, they could in the last resort upset the will altogether, by bringing the *querela inofficiosi testamenti*, in which they alleged, in effect, that the testator was insane at the time when he made such dispositions that causelessly left his children destitute.

The early Roman law of intestacy also reflects the conception of the State as a federation of clans. Before the XII. Tables, a man's property passed on death to his children who were within his *potestas* (including his widow, who had been *in manu*). Failing widow or children, the property reverted to the clan, by whom, presumably, it was regranted on the foundation of another separate family stock within the clan. By the time of the XII. Tables, however, the idea of the clan as a corporate unit was decaying, with the result that the nearest agnates were interposed in the order of succession, between the children *in potestate* and the clan. Later still, the object of a long period of Prætorian reform was to allow cognatic relations similar rights of succession to those enjoyed by the agnates. In other words, the Roman society at this period was passing out of its patriarchal organisation, and the natural desire was to benefit all relations of the deceased in the order of their proximity in blood to the deceased. This object was only completely accomplished in the legislation of Justinian.

The Roman view of the family is reproduced, with modifications, in the modern codes which are based on Roman law. The father's coercive powers are now, as in the later Roman law, powers of moderate correction in the child's interest only; but the parents still exercise the right of awarding the daughters, suitably dowered, in marriage. Continental codes have also long recognised adoption, by allowing it to effect, as in Roman law, a change of families, more especially as regards rights of succession. Further, these codes recognise the right, derived this time from Roman law through the Canon Law, of a parent to legitimate his offspring born out of wedlock, through subsequent marriage with the mother. Again, the doctrine of the *legitima portio* reappears in the codes of all continental countries, and in those of non-European States which have recently adopted codes on the

European model (*e.g.* Japan, China, Persia, Siam, and the Latin States of America). Thus, by the French Civil Code, a man is only permitted to dispose of half of his property by gift or by will, if he leaves one surviving child. If he leaves two children, he can only dispose of one-third of his property, and if he leaves three or more children he can only dispose of one-quarter. The remainder devolves independently upon the children. The rule is even extended to protect ascendants, in default of children. Thus, if a testator leaves ascendants in both the paternal and maternal lines, he can dispose of half his property freely by will; and if he leaves ascendants in one line only, he can dispose of three-quarters.

The German Civil Code works out the same principle rather differently. If a descendant is excluded from succession to a relative by will, he can demand a compulsory portion, which is equal to one-half the statutory portion. A statutory portion comprises what the descendant would have received in the event of the death intestate of the person whose will is being considered. The same right is also enjoyed by the parents and surviving spouse of the testator. If these have been left less than half their statutory portion, they can claim the deficiency. A testator may only disinherit relatives to whom a statutory portion is given if they are guilty of crime, or if they ill-treat the testator.

The *legitima portio* exists in Scottish law, and also in Roman-Dutch law. Since Roman-Dutch law is applied to British Guiana, the *portio* reappears there, but it has been abolished in South Africa and Ceylon.

In England, the English-speaking British Dominions, and the United States of America, where the English common law prevails, a different view of the family exists. It is true that early Teutonic custom, from which the common law developed, regarded the family as just a closely organised unit as it was in Roman law, and the power of the House-Father over his family, while perhaps not so extreme, was nevertheless extensive. English law, however, shrank from some of the consequences of this conception. Marriage, besides being a legal contract, became also a religious ceremony, controlled by the Church. In consequence, it was a permanent estate, which could be terminated (in such a way that the parties could remarry) only by special papal dispensation. In Roman law, on the other hand, the power of the *paterfamilias* was so absolute that he could divorce his wife simply by expelling her from his household. Further, from the time of the union of the Anglo-Saxon Kingdoms, there is no hint of any power of life and death enjoyed by the head of the household (except in respect of his slaves).

Killing a son is murder. Again, all the property of a son, during his father's lifetime, technically belonged to the father in Roman law, although the later law recognised the son's special relation to it, by designating certain portions of it as *peculium*. In English law, even in pre-Conquest times, there seems to be no hint of a disability, on the part of an adult son, to own property in his own name. He could certainly be a tenant of land. Except in very early days, the rights of a father, with regard to his children, were restricted to custody and guardianship of the child, a right to direct his education, and a right of reasonable chastisement to compel obedience, all enjoyed during the immaturity of the child. When he reached full age, the child was free from parental control.

Again, until 1926, English law did not recognise the ceremony of adoption as having legal consequences. It was purely a matter of private arrangement. Similarly, it was not possible to legitimate children born out of wedlock by the subsequent marriage of the parents. In both these particulars, English law in 1926 borrowed the Roman rule.

As far as the relation of husband and wife is concerned, however, English law has been more tenacious of the conception of their legal unity than Roman law. The old rule of the common law relating to the single personality of husband and wife prevailed. This had far-reaching consequences in all branches of the law. Whatever property the wife had owned before marriage became vested in the husband. If she acquired any while the marriage subsisted, that, too, accrued to the husband. Coincidentally, the husband assumed responsibility for his wife's torts, and for her contracts while she was acting as his agent. Neither husband nor wife could sue the other, and the husband was regarded as occupying such a dominant position in the household that he could chastise his wife, whilst she incurred no liability if she committed a crime in his presence, since it was deemed to be committed under his coercion; and again, the wife was allowed to assist and comfort her husband if he had committed a crime, immune from the liability of an accessory after the fact.

Few of these characteristics now remain. Equity regarded the married woman's unfavourable position with disfavour, and developed the conception of her separate estate. If property were bequeathed or devised to a married woman with any indication that it was to be enjoyed by her apart from her husband, although the legal title to it vested in the husband, Equity implied a trust in the wife's favour. Further, since it was always possible for the wife, under the influence of the husband, to surrender to him her beneficial interest in the property, Equity permitted the

donor to give it with a restraint upon anticipation, in virtue of which it was not possible for the married woman to alienate the *corpus* of her property under any circumstances ; she was merely free to enjoy the income derived from it. In the latter part of the nineteenth century, legislation gave statutory force to the doctrines of Equity, and created the married woman's separate estate in law. This now includes all property given to her apart from her husband, and all separate sources of income, or personal earnings. In respect of this, she can act as if she were a *feme sole*, but her liability is restricted to the extent of her separate estate.

As far as the married woman's torts, committed during marriage, are concerned, both husband and wife are now liable ; but the husband is only liable for the wife's ante-nuptial torts to the extent of property which he acquires through her on marriage. In contracts the husband is liable when the wife contracts as his agent, whilst in crime, the presumption of coercion was abolished in 1925, although it may still be pleaded as a fact. The husband may no longer beat or imprison his wife, whilst the wife may sue the husband in tort for the protection of her separate property.

Apart from the Law of Husband and Wife, therefore, English law has tended rather towards the individualisation of legal capacities than towards the conception of the family as a corporate whole. It is not thus surprising to find in English law a steady movement towards complete freedom of testation. As far as the English Law of Succession is concerned, it was necessary until 1925 to draw a distinction between real and personal property. The will of chattels seems to have been known in Anglo-Saxon times—most probably in consequence of the influence of the Church—but bequests by will only became common after the Norman Conquest. The Church Courts then assumed jurisdiction in all matters relating to the making and carrying into effect of wills—a jurisdiction which they retained until the establishment of the Court of Probate in 1857. It was not possible at first, however, for a man to make what bequests he pleased. On intestacy it was settled that a man's chattels were to be divided among his wife and children, and the Church gradually established the rule that, in any event, a man's property on his death fell into certain "Reasonable Parts." Thus, the deceased's widow took one-third of the property, or one-half if there were no children ; the children also took a third, or a half if there were no widow. The remaining third or half could be disposed of by the deceased in his will. If it were not so disposed of, it accrued to the Church, apparently on the assumption that wills were principally made in the Church's favour, and it was not fitting for the Church to lose her share through the accident of intestacy.

By the Reformation, however, freedom of testation for personal property had been won, and the Statutes of Distribution (1670) provided that on intestacy :

1. The widow took one-third, if the deceased left children ; one-half if they were childless. A statute of 1890 gave the widow, if there were no children, £500 in addition to the foregoing benefits.
2. If there were no widow, the whole estate was divided equally among the children. If any of these were dead, their issue received the deceased child's share. If there were no widow and no children, then the estate was divided equally among the blood relations of nearest degree to the deceased. If the widow survived, half the estate was so divided among the blood relations.

This was the law until 1925, although well on into the eighteenth century there were local customs in certain parts of England (notably in the ecclesiastical Province of York) preventing persons leaving definite portions of their personal estate (the Roman legitimate portions) away from the widow and children.

Since the tenure of land in England became feudalised at the Norman Conquest, the law relating to the devolution of real property differed fundamentally from that relating to chattels. A personal relation existed between a tenant and his overlord, and from the standpoint of abstract feudal theory, the overlord could refuse to admit, as a substitute for the tenant, any one who was repugnant to him. The practical consequence of this was that the tenant was forbidden to alienate his lands, either *inter vivos* or on death, and they passed indefeasibly to his eldest son. This arrangement satisfied the family pride of the tenant, as he was able to hand on his feudal holding undivided to his heir. It also facilitated, from the overlord's standpoint, undue difficulty in exacting the feudal services through the multiplication of feudal holdings which would have been the consequence of devolution to a man's issue equally.

The tenant was able to avoid the consequences of this inability to alienate by subinfeudation, but the Statute of *Quia Emptores* abolished this practice. As an inevitable consequence, however, the right of the tenant to alienate land during his lifetime, but not on death, was gained. In 1540, land became for the first time legally alienable by will, although the tenant in knight-service could still only bequeath two-thirds of his estate by will. In 1660, all land finally became alienable by will, but the great landowners

were still able to secure the transmission of their individual estates to their heirs through the evolution of the family settlement.

Thus, from the seventeenth century onwards, English law has permitted complete freedom of testation, but in the event of intestacy, the manner of devolution of real property differed from that of personal property. In 1925, however, the Administration of Estates Act established a common mode of devolution for both kinds of property, which now descends as follows :

1. The surviving husband or wife takes absolutely all "Personal chattels," together with £1000, and,
 - (a) If there are no issue and no statutory next of kin, then the rest of the estate absolutely.
 - (b) If there are no issue, but statutory next of kin, then a life interest in the residue.
 - (c) If there are issue, a life interest in half the residue.

Subject always to the rights of the surviving spouse, the whole of the estate passes to the following groups of persons, each to the exclusion of the following groups :

1. Issue, if there are any. These share equally the income of half the estate during the lifetime of the surviving spouse, and receive the whole of the estate afterwards.
2. Failing issue, the property goes to the parents of the deceased equally.
3. In default of issue or parents, the estate passes to the deceased's relatives in the following order :
 - (a) Whole-blood brothers and sisters.
 - (b) Half-blood brothers and sisters.
 - (c) Grandparents.
 - (d) Whole-blood uncles and aunts.
 - (e) Half-blood uncles and aunts.

In default of any of the foregoing classes of relatives, the estate now passes to the Crown as *bona vacantia*.

35.—PRIVATE LAW: THE LAW OF PERSONS

THE modern legal text-book has comparatively little to say concerning the Law of Persons. In Roman law, however, this division of private law was of some importance. The Roman institutional writers seem to have adopted a traditional threefold division of the subject—into the Law of Persons, the Law of Things, and the Law of Actions.¹ Exactly what is implied by this division, however, has been much disputed. Austin held that it was intended to include an account of the rights and duties of persons whose status varied from the normal. Poste, in extension of this view, adds, concerning Gaius' *Institutes*, that while the Law of Things regards men simply as having equal capacity to enter into legal relations, the Law of Persons considers them as unequals, and discusses the nature of their differences.² Buckland points out, however, that actually the differences in status considered are far from exhaustive (thus Gaius says nothing of Vestal Virgins, *decuriones*, *anchorati*, etc.), and that the rights and duties of such persons are not considered under the heading of the Law of Persons at all.

Another suggested explanation of what the Romans implied by the Law of Persons is Family Rights and Duties. This, however, is not accurate, for although the question of family rights occupies an important place in the Law of Persons, there are many questions of status considered in this branch of law having no connection with Family Law (*e.g.* citizenship), and on the other hand, certain important parts of Family Law are not discussed at all. Thus, there is no exposition of *patriapotestas*, knowledge of which seems to be assumed, whilst juristic personality is not systematically expounded.

Still a further attempted explanation of the Roman division is that every legal rule can be regarded from three points of view. There is first the question of the person who is affected by it; secondly, the subject-matter involved; and thirdly, the remedy by which the right is enforced. The chief objection to this view seems to be that this conception of the nature of the division is too abstract; but it was first advanced by Theophilus in the sixth century, and might possibly have been familiar to the classical

¹ Buckland, *A Text-Book of Roman Law*, p. 56.

² P. 36.

jurists themselves. According to this view of the topic, what arises for discussion under the heading "Persons" is not the law relating to the rights and duties of persons of abnormal legal capacity, but the persons themselves, or at least, the methods by which abnormal personalities arise and terminate. Thus, Gaius is concerned almost exclusively with status. He observes :

"The first division of men by the law of persons is into freemen and slaves. Freemen are divided into freeborn and freedmen. The freeborn are free by birth ; freedmen by manumission from legal slavery. Freedmen, again, are divided into three classes : citizens of Rome, natives, and persons on the footing of enemies surrendered at discretion."¹

The succeeding titles explain how these conditions arise and may be changed.

The nature of status, and some of the principal examples of abnormal status, have already been considered in an earlier chapter. It remains only to notice, therefore, how an individual's status could be modified in Roman law. It could be affected in three ways : through loss of liberty, citizenship, and family rights, occurring as a result of *capitis deminutio maxima* ; through loss of citizenship and family rights, as a result of *capitis deminutio media* ; or through loss of an individual's position in the family, as a result of *capitis deminutio minima*.²

The operation of *capitis deminutio* is not altogether free from difficulty. Gaius defines it as *prioris status permutatio*, a diminution of civil rights.³ This is an exact definition of the consequences of *capitis deminutio maxima* and *media*, the former of which occurred when a person who evaded being entered on the census-roll was sold into slavery, or when a person was condemned for a capital crime ; the latter occurred where a Roman citizen suffered *deportatio*. In both these classes there was a clear descent in the legal scale. *Capitis deminutio minima* might occur as the result of a variety of legal transactions. The following examples of it require notice :

1. Entry into civil bondage, as a result of the sale of the individual *per aes et librum*. The man in bondage was still free and a citizen, and his marriage remained valid ; but he assumed some of the legal characteristics of a slave.⁴ Clearly there was a change here for the worse in legal capacity.

2. *Adrogatio*.—This ceremony, accomplished by means of a legislative decree of the *Comitia Curiata*, resulted in the subjection of a person previously independent, to the *patriapotestas* of another. Here, again, there was a change for the worse in

¹ *Institutes*, i 7-12.

² *Ibid.* i. 159-64.

³ *Ibid.* i. 159.

⁴ Buckland, *Text-Book of Roman Law*, p. 134.

status. But it is stated by Paulus¹ that the children of an adrogated parent also suffer *capitis deminutio*, although their legal capacity has suffered no degradation. The only change is that whereas before they were subject to the power of their parent, now they are within the *potestas* of the adrogator. The statement of Paulus is not confirmed by any other jurist, however, and Savigny believes it to be inaccurate.²

3. *Emancipatio*.—Freedom of the son from parental power during his father's lifetime was accomplished by means of the triple sale, on which operated the rule of the XII. Tables, that a son who was sold three times by the father became freed. It is clear that the result of this procedure was an improvement in the status of the son, who henceforward became a citizen of full capacity. Here, however, Paulus explains that there is an imaginary descent of the son into a servile condition, even though it is only momentary.³

4. *Adoptio*.—In adoption, the son subject to the *potestas* of one parent is transferred to the *potestas* of another. The result of this transaction is that the person adopted, from the standpoint of legal capacity, is no worse off than he was before, but since the ceremony here also is effected by means of copper and scales, the reasoning of Paulus would again apply, and the adoptee would descend momentarily into a servile condition.

5. *In manum conventio*.—When a woman entered into a marriage *coemptio*, there was undoubtedly a change for the worse in her status if she had been independent before the marriage. If, however, she had been subject to the *potestas* of her father, there was no alteration in her status when she entered the *manus* of her husband. Nor was there ever a temporary descent into a servile condition during the ceremony, as there was in emancipation. Savigny assumes, in considering this case, that there was only *capitis deminutio* if the woman had been independent before. If this were the only exception, Savigny's suggestion might well be accepted, but there are others.

6. When a citizen sold into bondage was enfranchised, there was again a *capitis deminutio*. This fact was not known in the time of Savigny,⁴ and it is impossible to reconcile it with the theory that *capitis deminutio minima* necessarily involves a change for the worse in status, for here, again, there is no temporary descent into a servile condition, but an emergence from it into full citizenship once more.

The true conclusion seems to be that Gaius' statement, which is accepted by Savigny, is true of *capitis deminutio* in its early

¹ *Digest*, iv. v. 3.

³ *Digest*, iv. v. 3.

² Poste, p. 119.

⁴ Buckland, *op. cit.* p. 137.

existence, when it included only the greater and intermediate degrees (which Buckland suggests were not necessarily distinct at first). Later, the conception widened, not only to include cases where legal capacity was affected for the worse, but also those operations in virtue of which an individual's position in the family was altered. Thus, Ulpian observes: "There is *capitis deminutio minima* when both citizenship and liberty are unimpaired, and only position in household life is changed, as occurs in adoption and *conventio in manum*."

Finally, it remains to notice that Poste, in regarding the Law of Persons as that portion of the law which considers men as unequals, comes to the conclusion that "the Law of Persons or Law of Status in the private code is the intrusion of a portion of the public code into the private code."¹ He explains this by pointing out that Public Law is essentially the law relating to persons clothed with unequal legal powers. The forms of government are the methods by which one class of persons are placed in a position of subordination to another class. This semi-public characteristic has already been noticed with regard to the most important surviving part of the Law of Persons, *i.e.* Family Law. It is equally true with regard to the relation of slave and master, of guardian and ward, whilst Poste suggests that "the relation of *civis* to *peregrinus*, so far as any rights at all were accorded to *peregrinus*, may be conjectured to have originally been that of *patronus* to *cliens*, that is to say, of political superior to political inferior."²

This view of the Law of Status has a very logical appearance. Even the informally manumitted Latin was still in a position of dependence upon his manumitter, who succeeded to his property on death, whilst the freedman (even though a full citizen) still retained traces of his former dependence upon his patron. The Law of Persons may therefore be regarded as an offshoot of Public Law. The latter considers the relations of sovereign power to the individual, whilst the Law of Persons considers the extent to which private persons may be entrusted by the State with some degree of control over others whom the State considers as being, for some reason, unfit to enjoy full legal capacity.

¹ *Institutes*, p. 37.

² *Ibid.*

36.—PRIVATE LAW : THE LAW OF PROPERTY

A. TYPES OF PROPERTY

THE Law of Property, in its widest meaning, may be contrasted with the Law of Obligations. The former considers exclusively rights *in rem*, the latter rights *in personam*. In this sense of the term, such rights as the rights to personal freedom, to health, or to reputation are rights of property, equally with rights to land and to chattels. More frequently, however, the term "Law of Property" is regarded as applying, in a more restricted sense, only to those rights which increase an individual's material wealth, and which at the same time are available against the whole world (as distinct from obligations, which are rights *in personam*). Of these rights there are two kinds, divisible, according to the subject-matter over which the rights are exercised: (1) property in material objects; and (2) property in non-material objects. Although in Jurisprudence we consider only rights over objects, rather than the objects themselves, for brevity it is customary to speak of tangible and non-tangible property, from which arises frequent confusion between the right and the object over which it is exercised.

Considering first property in material things, it must be noticed that not all portions of the material world may be made the objects of private property. Thus, the sea and air are said to be incapable of being privately owned, although formerly all nations claimed proprietary rights in seas contiguous to their coasts (*e.g.* England claimed exclusive control over the North Sea, the English and Irish Channels), and even in modern international law, exclusive national jurisdiction within territorial waters survives; whilst with regard to the air, the maxim of the common law was *cujus est solum ejus est usque ad cælum*. The development of the art of flying made the interpretation of this maxim a question of practical importance, and it is now settled that there exists a right of innocent passage for aircraft in air-space similar to that which exists for ships on the high seas, provided that the aircraft fly at a reasonable height above land, and subject always to liability to the owners of land for objects dropped from the aircraft and causing damage to property below.

The Romans recognised further classes of objects, incapable of private appropriation. These were *res divini juris*, and were either *res sacra*, i.e. things devoted to the gods above, or *res religiosæ*, i.e. things devoted to the gods below.¹ Then, again, there were *res sanctæ*, things to a certain extent under divine protection and therefore incapable of private ownership. Examples of this class were the walls or gates of a city.² A class noticed by Justinian is worthy of comment. This is the class of *res publicæ*, the property of the State, e.g. highways, rivers, and harbours. These were again incapable of being privately owned, although all might enjoy the facilities they offered.

With these main limitations, therefore, material objects in Roman law were capable of being privately owned, whether in actual fact they possessed an owner at any given moment or not. In modern law it is not customary to invest supernatural beings with capacity to hold property, which is therefore now vested in some ascertainable persons. Most frequently, a charitable trust is created in furtherance of the religious objects contemplated.

Roman law recognised two distinct types of property—*res Mancipi* and *res nec Mancipi*. The former included land and houses in Italy, and tame animals used for draught and carriage (oxen, horses, mules, and asses). To these were added, by a curious confusion between the right of property and the object over which it was exercised, rustic (but not urban) servitudes. *Res nec Mancipi* included all other forms of property, whether tangible or intangible. The origin of the distinction between the two forms of property has been much disputed, but the best explanation seems to be that *res Mancipi* included only those forms of property which were necessary for the support of the Roman family in its emergence from the pastoral to the agricultural stage,³ i.e. when Roman law first assumed definite shape. The distinction was abolished by Justinian. Throughout its history it had involved the necessity for a *res Mancipi* to be transferred by *Mancipatio*, the formal civil law ceremony by copper and scales, in the presence of witnesses.

All systems of law have been compelled to recognise the distinction between land, including things permanently attached to it, and other forms of property. The former are immovables and cannot be destroyed, the latter are moveables and perishable. In Roman law, however, the distinction was less fundamental than in other systems. The chief difference was the period of usucapion required before an individual could acquire a full title to the object, the use of which he enjoyed. For land, the period was two years, for moveables one year only. Roman law drew

¹ Gaius, *Institutes*, ii. 2-6.

² *Ibid.* ii. 8.

³ Buckland, p. 240.

a further distinction between Italian land (which was *res Mancipi*) and provincial land, the latter being *res nec Mancipi*.

In modern systems of law, the distinction between moveables and immoveables has been of greater importance, owing to the fact that the land law became feudalised to a greater or lesser extent, whilst the law of moveables pursued a different line of development. The contrast is perhaps best illustrated from the history of English law. Technically, no one in England, at any rate from the Norman Conquest onwards, could own land in England but the King. All others were tenants, either of the King or of one of his tenants; and in consequence of his tenancy, the tenant was subject for several centuries to the liability to perform certain onerous services. This was true, not only of the "free" or knightly tenures, but also of copyhold tenures, having their origin in the holdings of villeins. Even the Church was included within the scheme, and a special ecclesiastical tenure, frankalmoign, was devised, although considerable portions of the Church's lands were held on the ordinary knightly tenures. All land in England was feudalised in this way, whereas on the Continent, some lands were beyond the scope of the feudal system, and were enjoyed in virtually as full a degree as other forms of property. Although the incidents of tenure have now practically disappeared from the land law of England, the theory still survives.

Further, it must be noticed with regard to land in England, that there can never be a larceny of land; whilst dealings with land have been much complicated by the fact that many interests in it short of full ownership have been recognised as capable of subsisting, with the consequence that an intending purchaser requires his vendor to furnish him with a good, clear title before he will undertake to buy the land. If he takes the land without investigating the title, he is bound by those limitations which would have been apparent had he investigated.

It should be noticed that the term "land" has been employed above to denote English immoveables. It would have been more correct, however, to speak of real property—a term which includes freehold and copyhold (the latter abolished since 1926) interests in land, together with servitudes over them, but which excludes leaseholds of land, which were regarded at first as chattels, but of a special kind, since "they concerned the realty," partaking, however, of the nature of both, for they became after a time recoverable in the same manner as real property, but devolved on death according to the rules applicable to chattels.

The term "real property" is derived from the fact that immoveables in England have always been specifically recoverable,

by a real action (*i.e.* an action to recover the thing itself), whilst the common law could only award damages for the wrongful deprivation of a chattel, and even to-day an action for damages is still the general remedy for chattels, although Equity may direct restitution of the thing itself, if it is unique or irreplaceable.¹

The doctrine of tenure was never applied in England to chattels, which were considered as being susceptible of absolute appropriation by private individuals. Further, although the possession and bailment of chattels have been recognised and protected by English law for centuries, it has also been equally clear that in parting with ownership of a chattel, the owner is unable to impose restrictions affecting future dispositions of it, to take effect outside the contractual relation existing between vendor and purchaser. In other words, restrictive covenants on the free disposition of chattels, to accompany the chattel into whatever hands it may go, are not usually enforceable in English law.²

It should also be noticed that until 1926, the mode of devolution of real property differed in England from that relating to chattels. Whilst the former devolved upon the heir, personal property was distributed among the next of kin equally. A common mode of succession has now been established for both forms of property, whilst the Law of Property Act, 1922, describes itself as "An Act to assimilate and amend the law of Real and Personal Estate."

Further, whilst it has been observed that transfers of real property only occur after a thorough and necessary investigation of title, chattels are transferred freely, without such an investigation, which would tend to arrest commercial activity. Whilst there is unquestionably a certain risk attached to such a system, the absence of many restrictions upon title to chattels makes such a procedure possible. To take an example, whilst the purchaser of a motor-car may find, and runs the risk of finding, that his vendor was not the owner, but merely a borrower, a pledgee, or even the thief of the car, it is not possible for him to find, when he has bought his car, that he is unable to sell it again, if the second purchaser proposes to use it for certain prohibited purposes, or that he may only drive it in certain towns, or on certain days of the week. This form of restrictive covenant can only exist as a result of express contract between vendor and purchaser, and between them only.

Intangible property is a later development in a legal system, and is a class which expands as civilisation becomes more com-

¹ *Pusey v. Pusey* (1684), 1 Vern. 273.

² But see E. C. S. Wade, "Restrictions on User," *Law Quarterly Review*, January 1928, pp. 51-65.

plex. It may be classified under two heads: (1) Rights over tangible property which are less than rights of ownership, and which may therefore be termed encumbrances. Discussion of these is postponed for the moment. (2) Rights in respect of those products of human labour, ingenuity or invention, which do not exist in the material world.

It was formerly customary for states to grant out to private individuals the sole right to manufacture or sell certain commodities. Such grants were termed monopolies, and were very valuable sources of wealth to their owners. In England, these grants were so numerous that they became the subject of considerable adverse criticism, and finally, in 1623, all monopolies in Great Britain were abolished, except those which preserved to a true and first inventor of a manufacture new within the realm the exclusive right to make and sell his contrivance for a limited period. The protection afforded has long been regulated by statute, but it is important to remember that even to-day a secret process or a scientific truth is incapable of being patented. As in the case of other forms of intangible property, a patent must be transferred in a special way, namely, by deed, and title only arises after registration and the issue of Letters Patent.

Another important form of intangible property is copyright, which consists in the monopoly of reproduction enjoyed by one who expresses intellectual effort in some definite artistic form, either as music, letters, painting, sculpture, drama, or other similar form. The class of artistic forms is obviously one which must increase with the development of art itself; and the law of copyright has been successfully invoked to restrain unauthorised reproductions made through the medium of broadcasting. The term during which copyright may now be enjoyed is a liberal one, extending in England for the duration of the life of the author and fifty years after his death; or if the work is unpublished at death, it subsists until publication and for fifty years afterwards. By the Berne Convention of 1886 (modified in 1896 and revised in 1908) provision was made for the international protection of copyright. Subjects of all states which are members of the Copyright Union are entitled to the protection of the copyright laws of all other signatories of the Convention. Copyright does not extend to ideas, but rather to the form in which they are expressed. It may be transferred by writing, but by the Copyright Act, 1911, when the author of the work is the first owner of the copyright, no assignment by him (except an assignment by will) can give the assignee any rights after the expiration of twenty-five years from the author's death; from which date the copyright becomes part of the author's estate.

The term "copyright" is also applied to another quite distinct type of intangible property—the design, which consists in any original design or model for the pattern, shape, or ornament of an article. A design cannot be registered under the Copyright Acts, and protection of the right only subsists for fifteen years from registration. A special form of transfer is required.

A trade-mark is "a mark used or proposed to be used upon or in connection with goods, for the purpose of indicating that they are the goods of the proprietor of such trade-mark." Legal protection dates from the last quarter of the nineteenth century, and the purpose of the protection is to distinguish the goods of one person from those of others who would seek to pass off theirs as his. Title dates from registration, and is transferable only in connection with the goodwill of the business dealing in the goods to which the mark is applied.

Trade names are frequently considered as forms of intangible property. They enjoy no special legal protection; but any person has a right to prevent another from employing the former's trade name, or an imitation of it, in such a manner as is calculated to lead the public to suppose that the goods of the latter person are those of the owner of the trade name. It has been held that a person may even be restrained from using his own name with this object.

Goodwill, though a recognised commercial asset, is an elusive legal conception. In *Crutwell v. Lye*,¹ Lord Eldon held it to be "nothing more than the probability that the old customers will resort to the old place," but in *Trego v. Hunt*² Lord Macnaghten gave the term a much wider meaning, holding it to be "the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money."

It may be personal, *e.g.* the skill of a solicitor, or it may attach to the property rather than to the individual in control of it, *e.g.* the goodwill of a public-house. Where the assignee of a business has not protected himself from the competition of his assignor by express contract, the Courts have been compelled to determine the extent of the protection afforded by the common law, and it has been established that although the person to whom the goodwill is assigned is the only person who may represent himself as carrying on the old business, the assignor may, nevertheless, carry on a similar business in competition with him, though not in such a way as to convey the impression that he is carrying on the old business; and further, the assignor may not solicit his

¹ (1810), 17 Ves. 346.

² (1896), A.C. at p. 24.

old customers, although if they come to him of their own accord, he may deal with them, but not solicit them further.

Another class of intangible property includes annuities and pensions. Both of these are payments, either gratuitous (as annuities usually are), or for past services (as pensions usually are), and may exist in perpetuity, for a life or lives, or for a fixed term. The right exists only in respect of the periodic payment, and does not give the beneficiary at any time a right to demand the capital sum of which the periodic payment is the produce. Occasionally annuities or pensions, when granted by the State, are made inalienable.

Stocks, shares, and debentures form another important class of intangible property. A share is an undivided interest of a specific nominal value, in the capital of an association, either corporate or unincorporate, whether carrying on a business for profit or not.¹ It gives no right to any specific portion of the property of the association, but merely a right to influence the affairs of the association in a specified manner, and if the association is a trading company, to acquire a specified portion of the firm's profits, and to receive also a share of the firm's assets when it is wound up. Shares, although possessing a specified face value, are usually issued on payment of a fraction of this, the shareholder being liable to pay further "calls" to the extent of the specified value of the share. When shares have been fully paid up, they are frequently converted into stock. This differs from shares in that no further calls can be made upon the holders (since the capital is fully paid up), and further, in that stock can be subdivided into unequal amounts, whilst shares are issued in a few classes, and within each class the face value of all shares is the same. Debentures are acknowledgments of debts due by an association; and frequently the acknowledgment creates a charge upon the association's property. This is either a fixed charge, when it extends only to the existing assets of the company, and may thus hinder greatly the activities of the association, especially if it is a trading company; or "floating," when the charge extends to the present and future assets of the association, permitting free disposition of them until some event contemplated by the debenture holders occurs (*e.g.* default in payment of interest), when the charge attaches to the assets of the association.

There are also a number of important forms of intangible property arising out of contract. Among the most important of these are negotiable instruments, and insurance policies. A negotiable instrument is, in effect, a contract by virtue of which

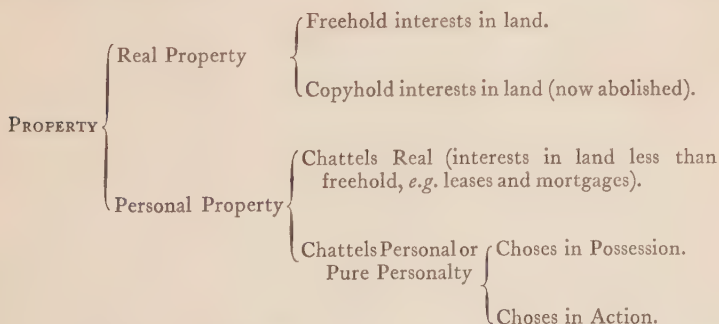
¹ Cf. Stephen's *Commentaries*, vol. ii. 18th edn. p. 573, and 19th edn. p. 181.

A undertakes an obligation in favour of B, the benefit of which can be transferred by B to any third party by the act of delivering the instrument evidencing the obligation, with the consequence that any third party who acquires it *bona fide* and for value acquires a good title, notwithstanding defects in the title of the transferor or previous holders; that is, it is an instrument "the property in which is acquired by any one who takes it *bona fide* and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such, and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument."¹ These forms of property were evolved through the customs of the merchants of Europe,² and the class is not yet closed.³

An insurance policy is an instrument in which the insurer undertakes to pay the insured a sum of money on the happening of an event which occasions loss to the insured. It differs from a gaming contract in that the insured, at the time of making the contract, possessed some interest which would be affected to his prejudice when the event contemplated occurred. Policies of insurance are usually assignable, although a term in the policy may forbid it, but the conditions of assignment vary.

There is one other form of intangible property which requires brief notice—the debt. A debt is a specific sum of money owed by one person to another, and recoverable by action. The sum need not be immediately payable, nor need it arise out of contract.

Debts, together with the other forms of intangible property already considered, are grouped together in English law under the term "choses in action." All property in English law could be grouped as follows:



¹ Willis, *Negotiable Instruments*, p. 6.

² See *Goodwin v. Roberts* (1875), L.R. 10, Ex. 337.

³ *Bechuana and Exploration Co. v. London Trading Bank* (1898), 2 Q.B. 638.

A chose in possession is a tangible object of which a person may have present enjoyment, and which is capable of transfer by physical delivery. A chose in action is a right, other than a right exercisable directly over land, which cannot be enforced by taking possession of the material object, but only by the institution of legal proceedings. At common law, a chose in action could not be assigned in order that the assignee could sue in his own name, but there were numerous exceptions to this,¹ and many choses in action were assignable in Equity. Now, however, by the Law of Property Act, 1925, s. 136 (re-enacting s. 25 of the Judicature Act, 1873), it is provided that "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same, without the concurrence of the assignor."²

Finally, it should be observed that in Roman law there existed a special kind of property, the *universitas bonorum*, comprising the whole of a man's assets and liabilities considered as an undivided whole.

¹ See Stephen's *Commentaries*, 18th edn. vol. ii. p. 609.

² On the meaning of this section, see Snell's *Equity*, pp. 50-6.

37.—PRIVATE LAW: THE LAW OF PROPERTY

(continued)

B. THE ACQUISITION OF PROPERTY

TITLE to property of all kinds is acquired and lost through the operation of dispositive or vestitive facts, the nature of which has already been explained. Moreover, since something has just been said of the way in which property in intangible things is acquired and transferred in the last chapter, it only remains to consider how property in intangible objects is acquired. Acquisition of tangible property is either original or derivative.

I. ORIGINAL METHODS OF ACQUISITION

These modes were discussed by the Roman jurists with some fulness, and their discussions have influenced extensively the law of personal property in most of the states of modern Europe, including England.

(a) *Occupatio* consisted in the physical act of taking that which previously had belonged to no one. This applied principally to wild animals, and property in them only arose when the animal was effectively reduced into the control of the occupier, and lasted only so long as effective control was maintained. The same principle of acquisition is also applicable to things finally abandoned by their previous owner, and for the time being without an owner. Thus, when a railway porter collects newspapers from an empty train at a railway terminus, there is a good *occupatio*. Gaius states that property captured from the enemy is capable of *occupatio*,¹ but it seems probable that the State here is the person acquiring,² and where the State disposed of captured property to private persons, title to it is obviously derived from the State.

(b) *Accessio* consisted in the acquisition of property through its union with property already enjoyed by the acquirer.³ Of this there were several varieties. In the first place, moveables might be mixed with moveables in such a way that they could be separated again (*commixtio*). Here there was no *accessio*, for each owner retained his own property. Again, if two moveables were mingled in such a way that they were not separable (*confusio*), there

¹ *Institutes*, ii. 69.

² Buckland, p. 209.

³ *Ibid.* p. 210.

was again no *accessio*, but the product of the mixture was owned by the two owners of its constituents in common. But if, in the union of the two substances by *confusio*, one was clearly accessory to the other, then the whole accrued to the owner of the principal substance. Obviously, it is not easy in all cases to determine which is principal and which accessory, but the most satisfactory test seems to be that that substance to retain its identity, in essence and name unchanged, is the principal. The relative value of the two elements was not always decisive, for writing is always accessory to parchment. On the question of painting there was much difference of opinion, but it was decided by Justinian that the tablet or canvas acceded to the picture.

If land acceded to land (*i.e.* through imperceptible accretion), then the new land belonged to the owner of the land to which it accrued; but if a definite piece of land was removed and placed in juxtaposition to the land of another, ownership of it was not lost by the original owner until trees in it struck root in the contiguous land. If a river changed its course, its former bed belonged to the owners of its former banks.

If moveables were attached to immoveables they accrued to the land. Thus crops sown accrue to the land, and beams built into a house become part of the house, and belong to the owner of it. The Romans, however, considered also the special case of materials used to build edifices on the land of another. If A built on his own land with B's materials, the edifice belonged to A; but B could have his materials back when the building was demolished, and if A had used them in bad faith, B could also bring an action for double their value. If B built with his own materials on A's land, B could recover his expenses if he had made a genuine error, and he could also recover his materials when the building was demolished. If he built in bad faith, he forfeited all interest in the edifice.¹

In English law, the rule allotting moveables permanently attached to the land to the owner of the land has recently been considerably modified by the right of the tenant to compensation for certain classes of fixtures which he installs.

(c) *Specificatio* occurred when a person manufactured a thing from materials belonging wholly or in part to another. In such a case, the Sabinians held that ownership of the manufactured product was in the owner of the materials; but the Proculians maintained that when a new article came into existence in this way, it belonged to the maker. Justinian ended the controversy by deciding that where an entirely new type of article came into existence, it belonged to the maker if not reducible to its original

¹ See further, Buckland, pp. 213-5.

form again, but if it could be reduced, it belonged to the owner of the materials.

(d) *Thesauri Inventio*, or Treasure Trove.—Where treasure was discovered, in Roman law, after all trace of previous ownership in it was lost, the finder was entitled to it, if it was found on his own land, but he shared it with the owner of the land, if the land belonged to another. In English law, treasure trove is the property of the Crown. The basis of acquisition is obviously closely akin to *occupatio*, since there is little difference between a chattel whose owner cannot be found and one whose owner has abandoned it.

(e) *Fructuum Perceptio*.—This arose when a person gained actual control of the fruits of a thing, when he was not the owner of the thing itself, e.g. a hirer or usufructuary. The rule applied not only to crops and vegetable fruits, but also to the young of animals, although the children of slaves were beyond its scope.

(f) *Fructuum Separatio*.—This is a distinct form of acquisition from *fructuum perceptio*. In *separatio*, the acquirer is in possession of the thing itself, and therefore acquires, no matter who makes the *separatio*. In *perceptio*, the acquirer is not in possession of the thing, and must therefore acquire the fruits by gaining control of them. Both the emphyteuta and the *bona fide possessor* acquired by *separatio*.¹

2. DERIVATIVE METHODS OF ACQUISITION

The juristic nature of this type of acquisition has already been discussed.² It remains only to consider its principal forms, but it must first be noticed, in dealing with derivative acquisition, that the mode of acquisition must be carefully distinguished from the underlying reasons giving rise to that mode. Thus, sale is not a mode of acquisition, but a reason for it, in consequence of which acquisition takes place, frequently, but not necessarily, by *traditio*.

(a) *Traditio*.—This was by far the most important of the *jure naturali* modes of acquisition in Roman law. It consisted in the transfer of ownership by transfer of the thing itself.³ Generally, this was effected by a transfer of possession by actual delivery of the thing itself, but there are varieties of transfer in which the transfer of control does not involve delivery.

- (1) Delivery at the house, or to the nominee of the acquirer, is a good *traditio*.

¹ See further, Buckland, pp. 222–8.

² Chapter 23.

³ Buckland, p. 228.

- (2) *Traditio longa manu* occurs when the transferor points out the article to the acquirer, authorises him to take it, and at the same time puts it in his power to do so at once.
- (3) *Traditio breve manu* occurs when the acquirer is already in possession of the thing, and the transferor makes a declaration that the acquirer is henceforth the owner of it.
- (4) *Constitutum possessorium* is the opposite of this. The transferor, having hitherto been the owner, makes a declaration that he will henceforth hold the thing, subject to the control of the acquirer, as owner.

In *traditio*, there must always be an intention to surrender full ownership, and also *justa causa* for the transfer.

In modern English law, the requirement of *traditio* for a transfer of property has been to a large extent abandoned. Land is transferred by the execution of a deed of conveyance, whilst the Sale of Goods Act, 1893, provides that, in sale, property passes when the parties intend to do so,¹ but if no intention is apparent, then (1) if there is an unconditional sale of specific goods, property passes when the sale is complete (*i.e.* when the price has been agreed on); (2) if the sale is of specific goods, and something still remains to be done to them, then property does not pass until the vendor has done what is required of him and has given notice to the buyer;² (3) if the buyer is required to do something as a condition precedent of the passing of the property (*e.g.* if he has to pay the price), property does not pass until he has done what is required, even though the goods have actually been delivered;³ (4) when goods are delivered to the buyer on approval, or "on sale or return," property does not pass to the buyer until he has signified his acceptance to the seller, or has done any other act adopting the transaction, or, without giving notice of rejection, he has retained the goods beyond the time agreed on, or for an unreasonable time; and (5) when the sale is of unappropriated goods, property does not pass until the goods are appropriated to the contract, with the concurrence of the parties.⁴

(b) *Mancipatio* was the appropriate civil law mode of conveyance in early Roman law for *res Mancipi*. It was a formal act, which only a Roman citizen could perform, in the presence of five witnesses, also Roman citizens, and a balance-holder. The alienee, holding a piece of bronze in his hand, declared *Hunc ego hominem ex jure quiritium meum esse aio isque mihi emptus esto hoc*

¹ S. 17.² S. 18.³ S. 18.⁴ S. 18.

are æneaque libra, and then struck the scale with the bronze, which represented the purchase money.¹ If the thing mancipated were a moveable, it must be present at the time of mancipation, and the acquirer must grasp it in his hand.² The bronze ingot was a survival from the time when copper was actually weighed out as the price.³

(c) *In Jure Cessio*.—This was an alternative formal mode of alienation of both *res Mancipi* and *res nec Mancipi*, and took the form of a fictitious lawsuit, in which the acquirer claimed the *res*, and on the alienor raising no objection, the Prætor formally awarded it to the claimant. It seems to have been rarely used for transfers of tangible property, but rather for incorporeal property, inheritances, and rights of guardianship.⁴

(d) *Gift*.—Generally speaking, a gift is not a mode of acquisition, but a reason for it, the mode adopted being *traditio*.⁵ Only when property passes without delivery is gift a mode of acquisition. This was only possible, and then exceptionally, in later Roman law. Thus Justinian allowed a *pactum donatio* to effect a transfer of property. Moreover, a *donatio mortis causa* operated as a mode of acquisition, if it took the form of a statement that on the death of A, property of A should become the property of B. In this form, it closely resembles a legacy, but the requirements were not identical.⁶

In English law, a gift, *inter vivos*, must always be accompanied by delivery, for it to be effective, unless it is made under seal, which thus acts as a mode of acquisition. A *donatio mortis causa* must also be accompanied by delivery, although this may be actual or constructive.

(e) *Usucapion*.—This is classed by Holland as a species of original acquisition,⁷ but it is clearly derivative, otherwise it would be indistinguishable from *occupatio*. It consisted in the acquisition of a positive title to property through possession for a specified time—two years for land, and one year for moveables. The possession must be continuous and *bona fide*, i.e. under the impression that the possessor had a right to be in possession. There must also be *justa causa*.

There existed also in the later Roman law *longi temporis præscriptio*, in virtue of which title to property became barred after the expiration of ten or twenty years. This, however, is not strictly a mode of acquisition at all, since the person in possession was not constituted owner at the expiration of the required period. In English law, prescription not only extinguishes the

¹ Gaius, i. 119.

² *Ibid.* p. 121.

³ *Ibid.* p. 122.

⁴ Buckland, p. 235.

⁵ *Ibid.* p. 253.

⁶ Justinian *Institutes*, II. vii. 1.

⁷ *Jurisprudence*, p. 217.

title of the former owner, but confers a title upon the person in possession, provided that the possession is continuous and *nec vi, clam, aut precario*.

(f) *Bankruptcy*.—The effect of adjudication in bankruptcy in English law is to transfer to the official receiver, and afterwards to the trustee in bankruptcy, all property of the bankrupt at the commencement of the bankruptcy, except property held by the bankrupt in trust for some other person, the right of presentation to a vacant church living, and tools of trade and wearing apparel of the bankrupt, to an amount not exceeding £20. Further, bankruptcy operates to transfer to the trustee property of which the bankrupt is not the owner, but which was in the possession, order, and disposition of the bankrupt, in his trade or business, with the consent of the true owner, under such circumstances that the bankrupt is the reputed owner of the property.

(g) *Deed*.—For several centuries the only method of conveying land in England, apart from suffering a recovery (a fictitious lawsuit adjudging the land to another), was by feoffment. This consisted in an oral gift of land, accompanied by livery of seisin, or delivery of possession of the land. The desire of conveyancers, prompted by landowners, however, was always towards the establishment of a secret method of conveyance by deed, and the Real Property Act, 1845, made it necessary for all conveyances to be evidenced by deed. The Law of Property Act, 1925, made all conveyances of land void unless made by deed, the essentials of which are that the document should be in writing, signed, sealed, and delivered. Delivery simply involves putting it into effect, usually by employing the formula: "I deliver this as my act and deed."

(h) *Bills of Sale*.—Just as the tendency of the English law of real property was towards the establishment of a system whereby transfers of property were effected by deed, so there was a similar tendency towards the transfer of goods without delivery, by deed of assignment. Such assignments are termed bills of sale. The institution of this form of conveyance for chattels, however, was attended by many dangers, insomuch as it was possible for debtors to assign away their property in this way, although apparently remaining in full control of it. Accordingly, a series of Bills of Sales Acts, and especially the Act of 1878, have imposed a number of conditions before such assignments can be recognised as effective.

Bills of Sale, in virtue of which property is finally assigned to another, should be carefully distinguished from bills of sale which merely charge property by way of security for loans. These are regulated by the Acts of 1878 and 1882.

(i) *Wills*.—The relation between the will in early law to the law of succession has already been indicated. It only remains to consider the effect of a will upon title to property.

Succession by will, in Roman law, was the main form of universal succession. Every will must contain the institution of an heir upon whom the inheritance, as an undivided whole, devolved, after the death of the testator, and upon the entry of the heir. There were several forms of will: (1) *Testamentum in comitia calatis*, an exceedingly ancient form, early obsolete, oral, and a public act; (2) *In procinctu*, another early oral form, made before the army, drawn up in battle array; (3) *Per æs et libram*, an adaptation of *mancipatio* to the disposition of property on death, the validity of the nuncupative part depending upon the XII. Tables; (4) *The Prætorian will*, sealed by seven witnesses.

If the heir were an *extraneus*, he might refuse to enter. Until he did so, the *hereditas* was *jacens*, and belonged to no one, being regarded from some points of view as a legal person. When the heir entered, the proprietary rights and liabilities of the deceased passed to him.

The effect of legacies varied, according to the form they assumed. Where a legacy was *per vindicationem*, property vested in the legatee as soon as the will took effect, so that he could vindicate his legacy. A legacy *per damnationem* condemned the heir to give, so that property remained in the heir, until he transferred it, the legatee possessing only an action *in personam*. A legacy *sinendi modo* had the same effect until the heir conveyed, or the legatee took the legacy. The effect of a legacy *per præceptionem* is not clear, for it was disputed whether the legatee could bring a *vindicatio* or not. Ulpian declared that only property which could be vindicated could be left in this way.¹ The *Senatus consultum Neronianum* (A.D. 64) provided that a legacy should be construed to take effect in the form most favourable to it.

On the death of a person leaving a will, under English law, the whole of his real and personal property devolves upon his personal representatives. These are his executors, named in the will, or if none has been named, then upon administrators, *cum testamento annexo*. The requisites of a valid will are defined by the Wills Act, 1837. Until the nineteenth century, however, real property passed under a will directly to the devisees; but this was abolished by the Land Transfer Act, 1897. The personal representatives assemble the property of the deceased, and after paying his debts, distribute it to the beneficiaries indicated by the will, whose acquisition is therefore derived from the personal representatives.

¹ See further, Buckland, p. 333.

(j) *Intestacy*.—On intestacy in Roman law, as under a will, an heir succeeded to the deceased's property on entry into the inheritance. In English law, the property of the deceased intestate passes to the administrator, to be distributed by him in accordance with the provision of the Administration of Estates Act, 1925.

(k) *Adjudicatio*.—Where property was held in common, title to specific portions of it might arise in the individual owners as a consequence of a decision in one of three divisory actions :

1. *Communi dividundo*, where the property was held in common.
2. *Familiæ erciscundæ*, where a *hereditas* was the subject of division.
3. *Finium regundorum*, where boundaries had to be regulated.

(l) *Survivorship and Accrual*.—In Roman law, where a slave was held in common by two or more persons, and one owner manumitted the slave, the shares of the remaining co-owners were increased thereby.

In English law, where two or more persons hold land on joint-tenancy, there is a right of survivorship to the shares of those tenants who predecease their co-tenants.

(m) *Lex*.—In some cases, in all systems of law, statutory enactment may effect a compulsory change of title to property. Bankruptcy is merely a special form of this.¹

(n) *Forfeiture*.—In English law, it is provided that for certain illegal acts by the tenant of land, all his interest may be forfeited. A common example of this was formerly alienation into mortmain, *i.e.* to a corporation ; but many corporations are now empowered to hold land. Before 1870, also, the lands of a convicted felon were forfeited to the Crown.² Forfeiture is frequently, but not invariably, an example of transfer of property by operation of law. Forfeiture on breach of condition, however, is the example of transfer arising out of the agreement of the parties.

¹ For Roman Law, see Buckland, p. 253.

² For further examples of forfeiture, see Stephen's *Commentaries*, 18th edn. chap. xiv.

38.—PRIVATE LAW: THE LAW OF PROPERTY

(continued)

C. INTERESTS IN PROPERTY

THE relationship of ownership to possession has already been considered. It remains only to discuss, therefore, certain modes of enjoyment of property and also the principal types of interest, not amounting to ownership or possession, which may exist in the property of one person, in favour of another.

1. TRUSTS.—At certain stages in the evolution of a legal system, the rules of law are too restricted to permit an owner of property to bestow it upon whatever persons he pleases, either *inter vivos* or on death. For example, women, children, or corporations may be deemed incapable of acquiring property. When this position arises it is not unnatural that the owner resorts to the device of conveying property to a person who is legally entitled to hold it, commanding him at the same time to hold it for the benefit of the person whom the owner really desires to benefit. At first, it is clear that this command has no legal force, but merely moral force. Eventually, however, on account of the frequency of such transactions, the law finds it necessary to make some provision for these cases. This was the position reached in Roman law during the reign of Augustus, when the Emperor directed that certain specific *fidei commissa* should be enforced by the consuls. Shortly afterwards, they became generally enforceable, and the office of *prætor fideicommissarius* was established to deal with them.¹

A similar development occurred in mediæval English law in respect of the Use or Trust, which seems to have had its origin in the desire of religious orders to escape the Statutes of Mortmain, as well as the vows of poverty which some of those orders imposed, and the burdensome incidents of feudal tenure. The legal estate in the land was vested in a person who undertook to hold it for the benefit of the religious order. The Common Law Courts ignored this undertaking, regarding the tenant as the absolute owner, but the Chancellor, after hesitation, decided to enforce the use upon the tenant. The religious houses did

¹ Buckland, pp. 349–50.

not, in the long run, gain greatly by the institution, for the Statute of Mortmain of 1391 required a licence from the Crown before a corporation could enjoy even the use of lands; but the advantages of the new system were so obvious—they enabled tenants to avoid feudal incidents, and protected beneficiaries from forfeiture during domestic warfare—that uses increased rapidly.

The effect of the use or trust is to create a dual ownership—the bare legal ownership of the trustee-tenant, and the beneficial ownership of *cestui que trust*, which is enforceable against the trustee and all those deriving their title from him, and who have, or ought to have had, notice of the trust. Equitable ownership is therefore not so absolute as legal ownership where no trust exists, for whilst the legal owner may recover his property, no matter into whose hands it falls, the beneficiary of a trust cannot recover his property from one who had acquired the legal estate *bona fide*, and for value, without notice of the trust. He is left to his personal remedy against the trustee.

2. TERMS OF YEARS.—A term of years may be defined as an estate for a limited period, in the property of another, conferring on the holder a right to the exclusive use and enjoyment of the property. In English law, a term of years was at first regarded simply as a contractual relation between landlord and tenant, which did not give the tenant seisin, and which only gave him an action against his landlord, when dispossessed. By the time of Bracton, however, the lessee was regarded as having a species of property in the land, and later still his possession was protected against all, by the writ of *ejectio firmæ*, a variety of trespass.

English law never admitted the conception of a lease in perpetuity, but it recognised until 1926 what was, in effect, very similar, the perpetually renewable lease. By the Law of Property Act, 1922, however, such leases have been converted into terms of two thousand years.¹

In Roman law, the lease was treated simply as a variety of contractual obligation, giving a right *in personam* against the lessor, the lessee having detention merely. Two special forms—*emphyteusis* and *superficies*—require notice, however. *Emphyteusis* was a perpetual lease of land, *superficies* of buildings. It was long disputed whether they were to be considered as sales or leases, but Zeno decided that *emphyteusis* was a contract *sui generis*. It had its origin in the grants of *ager vectigalis* by the state or a city in perpetuity to a private cultivator. Although having their origin in contract, these two rights rapidly acquired the characteristics of rights *in rem*, transferable by *traditio*, and protected

¹ S. 145.

by the interdicts and *actiones fictitiæ*.¹ It has been suggested that the origin of the freehold tenure of the Middle Ages is to be found in *emphyteusis*.²

3. PLEDGE.—A pledge is a right in the property of another, enjoyed by one person as security for the payment of money due, and in virtue of which the creditor may take over and sell the thing pledged in default of payment.

The object of the law of pledge, in progressive legal systems, has always been to allow the debtor the maximum control of the object pledged, compatible with the security of the creditor. It follows, therefore, that there are several varieties of pledge, representing different stages of legal evolution.

(a) *Mortgage*.—The earliest form of pledge in Roman law was the transfer of both ownership and possession to the creditor, by *mancipatio*, subject to a *fiducia* for its reconveyance when the loan and interest were repaid. Similarly, in early English law, ownership of pledged land was transferred to the creditor, who entered into possession, and took the profits, either as interest, as in mortgage, or in reduction of the debt (*vifgage*). Here, again, there was a condition that if the money and interest were repaid by a date specified in the mortgage the creditor would reconvey the land to the debtor. If the debtor could not repay by the appointed day, the common law awarded the land to the creditor absolutely; but Equity restrained him, by developing the doctrine, "Once a mortgage, always a mortgage," allowing the mortgagor to redeem after the date for repayment was long past. Later, Equity discouraged the mortgagee from entering into possession of the land, by requiring from him the strictest account of his activities and profits. Thus the mortgagee's rights became confined virtually to a right of foreclosure or sale when the debtor made default in payment.

(b) *Antichretic Mortgage*.—The antichretic mortgage is of extreme antiquity, being found in the legal systems of Ancient Egypt, Babylonia, and China, and later incorporated into Greek and Roman law. It consisted in the exchange of money and land, each party acquiring full legal ownership, to be reassigned at some future date.³ In the meanwhile, the profits of the land were set off against the interest due on the money. The institution obviously belongs to an early people, being an attempt to permit the alienation of land for cultivation for a limited period, before the conception of the lease or other limited tenancy has been evolved.

¹ Buckland, p. 275.

² Poste's *Gaius*, p. 399.

³ In the Roman antichresis, the mortgagee only acquired possession of the thing pledged.

(c) *Pignus or Pawn*.—This is the most common form for a pledge of chattels, the essential characteristic being the acquisition of possession by the creditor, ownership remaining in the debtor. Normally, the creditor has no right of use, but merely one of sale, if the debtor fails to repay the debt at the expiration of a certain period.

(d) *Hypothec*.—This represents a further development in the conception of pledge, in which, although the creditor possessed full possessory rights, ownership remained in the debtor, and the thing itself was not handed over. It was applied first of all to the relation of landlord and tenant, in respect of rent due. Hypothec may arise in modern systems of law as a result of circumstances (*i.e.* the relation of the parties, as in landlord and tenant), by agreement (*i.e.* a “bottomry bond,” in virtue of which money is raised on the security of the ship and its cargo, to enable it to complete its voyage), or by judicial decision. It is clear that since the thing pledged remains in the apparent possession of the debtor, he may repledge it, and so defraud his creditors. Roman law, therefore, required a pledger by hypothec to declare existing charges when making a fresh charge, and the rule was that the earliest in time enjoyed priority. Modern law usually requires registration.

(e) *Bills of Sale*.—Bills of sale, as a mode of alienating chattels in English law without delivery, have already been considered. A bill of sale may also be employed to establish a mortgage of chattels. For the protection of the debtor, detailed regulations relating to mortgage bills have been laid down in the Bills of Sale Act, 1882, which, with the Act of 1878 and two later Acts of 1890 and 1891, govern the law of the topic. Briefly, the Act of 1878 establishes a form for mortgage bills, which must not be departed from in anything which is a characteristic of the form. There must be an inventory of chattels comprised in it, the consideration must be truly stated, and not less than £30. Any defeasance or other condition must appear on the bill itself; and the bill must be registered within seven days. A bill of sale effects a conditional change of ownership, subject to reconveyance.

(f) *Lien*.—A lien resembles pawn in that ownership remains in the debtor, whilst possession is vested in the creditor; but there exists, in general, no right of sale, but merely of detention. The right ceases as soon as possession is lost. A lien may be either particular, when there is a right to detain only those goods in respect of which the debt arose, or general, in which case it is a right to detain goods, not only for the debt arising in respect of them, but for all debts owed by that particular debtor. Examples of particular liens are those possessed by innkeepers, carriers,

and repairers ; examples of general liens are those of factors, bankers, and solicitors.

Distinct from the foregoing type of lien, however, is the maritime lien, which is a right attaching to the thing arising out of a maritime venture, and enforceable against the thing, no matter into whose hands it falls. It exists, therefore, when possession does not, and may be enforced by arrest and proceedings in the Admiralty Court. Examples of maritime liens are those of a salvor and of master and crew for wages due.

Lastly, there is the equitable lien, which consists in the right of a person to have a particular portion of property set aside for the payment of liabilities, *e.g.* a partner's right on dissolution to have the firm's assets appropriated to the payment of the firm's debts.

4. SERVITUDES.—A servitude is a “right or group of rights forming part of *dominium*, but separated from it and vested in some person other than the dominus.”¹ It is thus a restriction or encumbrance upon ownership, and in the case of the most important class of servitudes, as will be apparent shortly, it is an encumbrance for the benefit and better enjoyment of a neighbouring piece of land, passing with the ownership of that land. In such cases, the land for the benefit of which the servitude exists is known as the dominant tenement, the land ownership of which is encumbered by it as the servient tenement.

Servitudes have certain essential characteristics : (i) A servitude may not impose an obligation to do something, but merely to abstain from doing something. *Servitus in faciendo consistere non potest*. To this rule there was one exception—the right to have a wall supported by a neighbour's. This involved also an obligation on the part of the neighbour to keep it in repair. (ii) A man may not enjoy a servitude over his own property. *Nulli res sua servit*. From which it follows that when ownership of servient and dominant tenements are united, the servitude ceases to exist, and does not revive when the ownerships are again vested in different persons. (iii) There may be a servitude on a servitude. *Servitus servitutis non potest*. (iv) A servitude must be so used as to cause the least inconvenience, and it must be advantageous to property. *Servitus civiliter exercenda est*.²

Servitudes were divided in Roman law into Prædial and Personal Servitudes. Prædial servitudes existed only in respect of immoveable property, for the benefit of a neighbouring owner of immoveable property. Personal servitudes might apply both to moveables and immoveables, and, unlike prædial servitudes, were for a limited period and conferred possession of the property.

¹ Buckland, *Text-Book*, p. 258.

² *Ibid.* pp. 259–60.

Prædial servitudes were again divided into rustic and urban servitudes. The distinction was attributed to the fact that an urban servitude was enjoyed for the benefit of a building, a rustic servitude for the benefit of land. This distinction is not free from difficulties, nor is it an absolutely clear line of demarcation.¹ Prædial servitudes were very ancient in origin, four of them (*iter*, *via*, *actus*, and *aquæductus*) being probably as old as the XII. Tables. In the later law, they were very numerous.

Examples of rustic servitudes are :

- (a) *Iter*, or right of way over land for man and beast.
- (b) *Actus*, or right of way for ordinary carriages.
- (c) *Via*, the right of paved way for heavy-laden waggons.
- (d) *Aquæ haustus*, the right of drawing water from a private spring.
- (e) *Aquæ ductus*, the right of conveying water over land.
- (f) *Pecoris ad aquam appulsus*, the right of watering cattle.
- (g) *Jus pecoris pascendi*, the right of pasturing cattle.
- (h) *Jus caleis coquendi*, the right of burning lime.
- (i) *Jus cretæ eximendæ*, the right of quarrying for chalk.
- (j) *Jus arenæ fodiendæ*, the right of taking sand.
- (k) *Jus sylvæ cæduæ*, the right of cutting wood.

Examples of urban servitudes are :

- (a) *Jus tigni immittendi*, the right of inserting a beam in a neighbour's wall.
- (b) *Jus oneris prendi*, the right of resting a weight upon a neighbour's wall (usually the right of supporting one wall on another).
- (c) *Jus protegendi*, the right of projecting a roof over a neighbour's land.
- (d) *Jus stillicidii recipiendi*, the right of directing rainfall on to a neighbour's roof or land.
- (e) *Jus cloacæ immittendæ*, the right to erect a sewer passing through a neighbour's property.
- (f) *Jus luminis immittendæ*, the right of having a window in a neighbour's wall.
- (g) *Jus altius non tollendi*, the right of light, *i.e.* of forbidding a neighbour to raise the height of his buildings.
- (h) *Jus altius tollendi*, the acquired right to build higher.

There were many others. Rustic servitudes were positive, *i.e.* they conferred on the person enjoying the servitude a right

¹ Buckland, p. 262.

to do something unhindered, whilst most urban servitudes were negative, *i.e.* they conferred on the person enjoying them a right to prevent another from doing something.

English law divides servitudes into easements and profits *a prendre*. An easement is "a right attached to one particular piece of land which allows the owner of that land either to use the land of another person in a particular manner (as by walking over or depositing rubbish on it) or to restrict its uses by that other person to a particular extent, but which does not allow him to take any part of its natural produce or its soil."¹ A profit is a right to take something from the land of another.

Easements may be positive or negative, but they must all possess certain characteristics :

- (1) There must be both a dominant and a servient tenement.
An easement may never be *in gross*.
- (2) It must be beneficial to the dominant tenement.
- (3) The ownership of dominant and servient tenements must be vested in different persons.
- (4) The right must be capable of forming the subject-matter of a grant.²

Examples of easements are the rights of way, light, water, support, and fence, but there are many others.³ It is sometimes stated that the class of easements in English law is closed, but the better opinion seems to be that if a right enjoys the four characteristics given above, it will be classed as an easement. As Lord St. Leonards has put it : "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."⁴

Unlike easements, profits may be enjoyed *in gross*, *i.e.* they need not exist for the benefit of a particular piece of land. Examples of substances that may be taken from the land are the soil, grass, minerals, animals, sand, turf, acorns, or even ice from a canal. A profit which is enjoyed by a person to the exclusion of all others is termed a several profit, whilst one enjoyed by one person in common with others is a common (*e.g.* common or pasture or piscary). Commons are of an ancient origin, and it has been argued that they are survivals from the communal open-field system of Anglo-Saxon times, when every member of the village community enjoyed certain rights with respect to the uncultivated part of the land of the village. On the other hand, it has been maintained that the rights do not antedate feudalism,

¹ Cheshire, *Real Property*, 2nd edn. p. 239.

³ *Ibid.* p. 251.

² *Ibid.* pp. 241-50.

⁴ *Ibid.* p. 249.

and have their origin in grants which the lord of the manor made to his tenants in respect of the land of the manor.¹

Besides prædial servitudes, Roman law recognised an entirely different type of servitudes, not having any existence in English law—the personal servitudes. These applied to moveables as well as to immoveables, were limited in duration, and gave possession of the thing enjoyed to the person in whom the servitude was vested. Only such property as was not consumed by use could properly be the subject of a personal servitude, however. Of personal servitudes there existed the following :

- (i) *Usufruct*.—This was the right to enjoy the property of another and to take its fruits, but not to destroy it or change its character. It was normally for life, but might be for a fixed term. The children of a slave were not considered to be fruits, but the young of animals were. If the usufruct was of an estate, the usufructuary must keep it in proper condition and pay expenses. The right was inalienable. English law achieves the same result as the Roman (especially in the case of settled land) by the creation of a life estate, and the grant of wide powers to the tenant for life.
- (ii) *Usus*.—This was the right to use a thing without taking the fruits ; but the usuary of a house could live in it, though he could not let or sell it. If the thing enjoyed was an estate, at first he could take nothing, but it was eventually settled that he could take sufficient for household needs, but no more.
- (iii) *Habitatio* was the right of *usus* applied specifically to a house. It was for life, and could be created only by will or codicil.
- (iv) *Opera servorum vel animalium* was a modified form of *usus*, applied to the services of a slave or animal. *Opera* was a day's work.
- (v) *Quasi-usufruct*.—This was an extension of the conception of *usufruct* to things that were consumed by use. As much of the thing used, of the same quality, must be returned as was granted. If a flock were the subject of it, those that died must be replaced, but the remaining young could be retained. It applied to corn, money, wine, and similar commodities, and the usufructuary had to give security for a return of the specified quantity.

¹ Cheshire, pp. 286–8.

39.—PRIVATE LAW : THE LAW OF OBLIGATIONS

AN obligation is defined by Justinian as “a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State.” As distinct from rights of property, obligation is essentially personal in character. So personal a relation was it indeed conceived to be that in both Roman and English law, one important class of obligations—those arising out of delict—formerly terminated on death.¹ It should be noticed that obligation does not necessarily imply equality of position of the parties linked together. Each may be bound to perform some act for the benefit of the other ; on the other hand, one party only may be bound to do an act, and the other may have nothing more to do than to accept it.

Obligations are only exceptionally imposed on parties by operation of law. Almost invariably, the State leaves it to private individuals to enter into the obligation (*e.g.* by agreement, or by wrongful act of one of them), and then lends its authority to enforce the duties arising out of the relation. Justinian classified all obligations under four heads :

1. Contract.
2. Quasi-Contract.
3. Delict.
4. Quasi-Delict.

This classification is not perfect, and the divisions are not mutually exclusive, for a breach of contract may also be a delict ; but something more will be said on this point later.

I. CONTRACT

This is a comparatively late conception in all systems of law. It has been said that Roman law never developed a general theory of contract. Certain specific contracts were recognised at various stages of the development of Roman law, and theories were elaborated to harmonise them. Similarly, the English law of

¹ Possibly also, in early Roman law, rights arising out of contract also terminated on death. Buckland, p. 405.

contract only assumed definite shape in the sixteenth and seventeenth centuries.

It must first be noted that the term "contract" is used in two distinct senses. In the wide sense, it is used to denote any agreement in virtue of which the rights of the parties undergo modification. In this sense, a sale of goods, marriage, and conveyances of land are contracts. In the narrower sense, however, a contract is an agreement between two or more parties, as a result of which one or more is bound to perform some act or forbearance for the benefit of the other or others. It is thus an agreement giving rise to rights *in personam*.

In general, a contract can impose neither rights nor liabilities upon persons who are not parties to it. This does not prevent an agent from contracting for his principal, nor a principal from ratifying his agent's contracts, even if he only learns of them subsequently. But in these cases, the agent is only a channel of communication between the principal and the other contracting party. What the rule means is that a stranger to the contract can neither sue nor be sued upon it. This rule was framed in Roman law as follows: *Alteri Stipulari nemo potest*,¹ and in English law it was plainly laid down in *Tweddle v. Atkinson*,² and reaffirmed in *Dunlop v. Selfridge*.³ In Roman law, however, there were one or two exceptions to this rule (e.g. a promise to benefit an heir),⁴ and in some modern systems (e.g. those of France and South Africa) it has been established that if two persons contract as principals, one of them for the benefit of a third party, and that third party ratifies the contract and notifies his ratification to the person bound, then the third party can both sue and be sued upon the original contract.⁵

Contracts are a species of agreements, but not all agreements are contracts. Thus, an accepted invitation to dinner is an agreement, but it is not a contract, since there is no intention to enter into binding legal relations. Further, not all contracts are equally enforceable. The majority of contractual obligations are enforceable by action, but there are some which are not. Thus, in Roman law, some contractual obligations were only enforceable as a set-off in an action or as rights of deduction or retention. These were termed *obligationes naturales*. Similarly, in English law, a debt barred by lapse of time is no longer enforceable by action, but is of sufficient legal force to enable the

¹ Justinian, *Institutes*, III. xix. 19.

² (1861), 1 B. & S. 293.

³ (1915), A.C. 847.

⁴ Buckland, p. 423.

⁵ See further, the present writer's "*Alteri Stipulari Nemo Potest* in the Law of South Africa," *Journal of Comparative Legislation*, February 1929, pp. 81-6.

creditor to resist a claim by the debtor to recover it, if it is paid after the statutory period.

All contracts possess certain necessary elements. These are :

1. Two or more parties, having capacity to contract.
2. Offer and acceptance, giving rise to an agreement.
3. Some form or underlying reason for the conclusion of the agreement.
4. A legal and possible object.
5. The creation of rights *in personam* between the parties.

These essentials must now be considered separately.

I. TWO OR MORE PARTIES

No person may legally bind himself to perform certain acts for his own benefit. This is obviously a rule of common sense, but the further consequence follows that if A enters into a contract with A, B, and C, it is void as regards the agreement with himself, and binding only in respect of B and C. But if A, B, and C formed a corporation, then A's contract would be entirely binding, since the corporation is a separate legal person.

The parties must also possess the necessary legal capacity to contract. Thus, in Roman law, a *peregrinus*, a deaf person, and a dumb person were all debarred from making a *stipulatio*. In English law, an infant cannot make a contract, except for necessities, whilst a married woman's contracts bind her separate property (unless she contracts as her husband's agent), but involve her in no personal liability. The position of a lunatic, a convicted felon, an alien enemy, and a foreign sovereign also differ from the normal.

2. OFFER AND ACCEPTANCE

Every contract may be reduced to an offer by one party, and an acceptance by the other. Quite frequently the offer and acceptance are preceded by a good deal of preliminary negotiation, but there is some ascertainable moment when the minds of the parties are agreed upon the legal relations to be established. Offer and acceptance need not be in writing or even in words (unless writing or words are required as the necessary form), for a gesture may be sufficient, provided that it unambiguously relates to the subject-matter of the contract, as in sales by auction.

An offer may be general, or it may be specific. When it is general, it is made to all persons who become acquainted with

it, as in offers for rewards. It is specific when it is addressed to one or more specific persons. A general offer may be accepted by any one, but a specific offer may be accepted by those to whom it is addressed, and a purported acceptance by persons other than those addressed is a nullity. With regard to general offers, it should be noticed that their terms often dispense with the necessity for a communication of the acceptance. When this occurs, performance of the services indicated is a sufficient acceptance.¹

The question arises, How long does an offer remain open? A specific offer remains open until it is revoked, or until a reasonable time has elapsed, sufficient in the circumstances of the case for the other party to give full consideration to the offer. A general offer also remains open until revocation or until a reasonable time has elapsed, or until the services required have been given. Thus, if there is an offer of a reward for information leading to the arrest and conviction of a wrong-doer, only the first person who supplies it may recover.

Offer and acceptance must exactly correspond. Even the smallest deviation will entitle the offerer to refuse to fulfil the contract, and the offeree must always perform some overt act signifying his acceptance. Silence, in the Law of Contract, is not acceptance.

Special rules have been elaborated to cover the case of offers and acceptances made through the medium of the post. An offer made by post is not effective until it has been communicated, that is, delivered to the offeree. Similarly, a revocation of an offer is not made until it is communicated. But an acceptance is complete as soon as it is posted.

It has been argued that in contract a genuine agreement of wills is not required, but merely an outward expression of such an agreement. Thus, Professor Holland holds that "the legal meaning of such acts on the part of one man as induces another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a reasonable man, *i.e.* a judge or jury, would put upon such acts,"² a view which, in spite of the fact that it is difficult to reconcile all decided cases with it, seems correctly to enunciate the general principle of the law, which does not attempt to investigate into the recesses of a man's mind, but considers only how that mind operates upon the material world through his conduct.

Certain factors vitiate true consent, real or apparent. Thus, fraud entitles the party who has suffered it to repudiate the contract

¹ *Carlill v. The Carbolic Smoke Ball Co.* (1892), L.R. 2 Q.B. 484.

² *Jurisprudence*, pp. 265-6, *q.v.* for a fuller discussion.

if he pleases. A fraudulent representation has been defined in English law as one which is false in fact, and which has been made either knowingly, or without belief in its truth, or recklessly, careless whether it be true or false.¹ Duress, consisting in actual or threatened violence to a person, also entitles the party adversely affected by it to repudiate the contract. In English law, also, "undue influence" is a ground for avoidance. This consists in an unconscientious use of power by one of the parties over the other party, who, by circumstances, is impelled to place more reliance upon the conduct of the first party than is customary. In certain common relations of life, *e.g.* guardian and ward, solicitor and client, religious adviser and layman, such a relation unquestionably exists, whilst in others, the existence of the power must be proved, as where a youth is encouraged to a career of dissipation and extravagance through the agency of an older man, who profits in consequence.²

Mistake and innocent misrepresentation may also prevent the conclusion of a true agreement, but they operate in a different fashion from the factors already considered. Mistake is only a ground for the invalidation of a contract when it amounts to vital, operative mistake, *i.e.* when it goes to the root of the contract. Thus, in Roman law, if a man agreed to buy an article under the impression it was solid gold, and it turned out to be copper-plated, this amounted to *error in substantia*, and there was no contract. Similarly, in English law, an old man of feeble sight signed a bill of exchange, believing it to be a guarantee. It was held there was no contract, since he never intended to sign a bill of exchange.³ Again, in *Cundy v. Lindsay*,⁴ Blenkarn, by imitating the signature of the well-known firm of Blenkiron, obtained goods from Messrs. Lindsay, who thought they were dealing with Blenkiron. Here there was an obvious mistake as to the identity of the other party, and again there was no true agreement, and no contract. Wherever such a fundamental operative mistake exists, therefore, there is no contract at all.

An innocent misrepresentation is one which is made by a person who honestly believes it to be true, when, in fact, it is not. It may be a statement made before the contract was concluded, and not treated by either party as material, in which case it has no legal effect at all. Alternatively it may be made before the contract was concluded, but independently of it, whilst the party to whom it was made regarded it as material. In such a case it may be an independent agreement, giving the party acting

¹ *Derry v. Peek*, 14 A.C. at p. 374.

² *Smith v. Kay*, 7 H.L.C. 779.

³ *Foster v. Mackinnon*, L.R. 4 C.P. 711.

⁴ (1878), 3 A.C. 459. But see *Phillips v. Brooks* (1919), 2 K.B. 243.

on the faith of it a right to sue for damages if it subsequently turns out to be false. This is termed a warranty. Finally, it may be regarded by the party to whom it was made as a condition governing the formation of a contract which, if not true, would have been considered by him as definitely preventing the formation of the contract. This is termed a *condition*, and since it goes to the root of the contract, it entitles the injured party to rescind the contract. On the other hand, he may be content to treat it as a warranty, and sue for damages.

3. FORM OR UNDERLYING REASON

The earliest contracts were formal. Thus *nexum*, the earliest Roman contract, though oral, depended upon the strict adherence to certain formalities, whilst the validity of *stipulatio* depended for a long period upon the pronunciation of the solemn words, *Spondes ? Spondio*, alternative forms being subsequently admitted. So rigid were the rules of Roman law, that *stipulatio* was at first considered to be binding, even though induced by fraud. In English law, the contract under seal is unquestionably the oldest form.¹ Both systems, however, were compelled to admit a wider basis for the conclusion of a contract than adherence to certain set forms. In Roman law, this was solved by the evolution of the doctrine of *causa*. An agreement accompanied by *causa* was a valid contract.

Causa, however, is not easy to define. To say that it is some underlying reason, in virtue of which the agreement ought to be enforced, is merely to prompt the further question, What underlying reasons did the Romans recognise? Form was a sufficient *causa*. In the consensual contracts—sale, hire, partnership, and mandate—there was no form, mere agreement was sufficient. Sir Henry Maine bases the legal validity of these contracts upon their commercial importance,² and after pointing out that the consensual contracts were only the most important instances of *jure gentium* agreements, adds that while the four consensual contracts were the first to be admitted into Roman law, at a later stage “the revolution of the ancient Law of Contract was consummated when the Prætor of some one year announced in his Edict that he would grant equitable actions upon Pacts which had never been matured at all into Contracts, provided only that the Pacts in question had been founded on a consideration (*causa*).”³ *Causa* probably means nothing more than the recognition by law that a particular type of agreement is actionable. “To the

¹ Jenks, *Short History of English Law*, p. 136.

² *Ancient Law*, chap. ix.

³ P. 348.

Romans, an agreement was not actionable unless there was some reason why it should be. To modern English law an agreement is actionable unless there is some reason why it should not be. *Causa* thus means actionability which produces that characteristic. *Pacta legitima* had no *causa* except the fact that enactments made them actionable.”¹ The conception of *causa* has been generalised in modern systems of law based on Roman law, and, as far as it can be defined in general terms, it still means some underlying reason for the contract. In modern Roman-Dutch law, this conception has been extended to its farthest limit, so that a contract needs neither form nor consideration (in the English sense), but is actionable if the parties, having the necessary capacity, had the intention to contract a legal obligation which was both reasonable and lawful.²

The English doctrine of consideration has developed very differently. When the English Law of Contract was first taking definite shape in the fifteenth and sixteenth centuries, it seemed for a period that English law would enforce all agreements with a lawful object, deliberately concluded.³ This, however, was considered to be too wide a basis for the law, and it was established after hesitation that only promises which were either made under seal, or else were entered into in return for some “recompense,” were legally enforceable. The artificiality of the doctrine was perhaps not at first apparent, but it has long been settled law, that while a gratuitous promise of an estate is not enforceable, a similar promise in return for five shillings is. Further, motive is not consideration, so that a promise to give a son (of full age) a valuable thing on account of natural love and affection is not enforceable, whilst a similar promise in return for any trifle of financial worth is. Further, “if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration, and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference.”⁴ A promise is, of course, a good consideration for another promise, but a consideration which is, in effect, merely a service performed in the past is no consideration, unless the consideration moved at the request of the promisee. Even as understood in this sense, there are difficulties attached to the application of the doctrine. In gratuitous bailment, it is held that parting with the possession of the thing bailed is a sufficient consideration, but in gratuitous employment, the doctrine breaks

¹ Buckland, *op. cit.* p. 426.

² Lee, *Introduction to Roman-Dutch Law*, 2nd edn. pp. 212-5.

³ Jenks, *Short History of English Law*, pp. 139-40.

⁴ *Callisber v. Bischoffsheim*, L.R. 5 Q.B. 449.

down altogether. If A offers to perform services for B without reward, and B accepts, then A is under no liability if he does nothing in fulfilment of the undertaking, since there is no consideration; but A incurs liability if he starts to perform the services, and then performs the service so negligently that B suffers loss. In such a case, however, it has been suggested that the true ground of liability is in tort, in respect of the negligence.¹

Apart from the requirement of *causa* or consideration, certain classes of contracts, in some systems of law, also require to be embodied, at least as regards their material terms, in writing. Thus, negotiable instruments, in all modern systems, must be in writing, in order to enjoy legal existence at all; but in English law, the Statute of Frauds, 1677, sec. 4, provided: "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or (*sic*) sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." The effect of this section (one part of which, relating to the sale of land, is now re-enacted in the Law of Property Act, 1925, s. 40) is to make the contract unenforceable in the absence of a sufficient note or memorandum. A similar effect attaches to the Sale of Goods Act, 1893, s. 4, which requires a note or memorandum for the sale of goods of upwards of £10, unless there has been part delivery, part payment, or some earnest money paid to bind the bargain.

4. LEGALITY AND POSSIBILITY OF OBJECT

No system of law will enforce a contract which, either in its object or in its mode of achievement, contemplates a breach of law. Thus, all contracts with an alien enemy are void, since apart from the fact that the alien enemy has no capacity to make a contract, entering into legal relations with him during the continuance of a war is forbidden. Moreover, contracts involving some breach of the accepted moral standards of the community are also void, together with contracts which are

¹ See Holdsworth, *History of English Law*, vol. iii. p. 330.

contrary to public policy. The flexibility of this last ground upon which contracts may be held to be void has now become limited, and only certain well-defined classes of contract are included within it. Thus, contracts aiming at injury to the State in its relations with other states, or interfering with the administration of justice or the course of public business (*e.g.* a contract to secure a title for an individual), or affecting the sanctity of the marriage tie, or lastly, in undue and unreasonable restraint of trade, are examples of contracts void as contrary to public policy.

Wagering contracts stand on rather a different footing. Formerly in English law (but not in Roman law) they were fully enforceable. To distinguish a wager from a contract of insurance is sometimes a matter of considerable difficulty, but it has been authoritatively stated :

“ The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if an event turns out one way, A will lose, but if it turns out the other way, he will win.”¹

A contract of insurance closely resembles a wager in essentials, but differs in that there must always exist an “ insurable interest ” in the insurer at the time when the insurance is effected.

In England, all wagers were enforceable at law until the latter part of the eighteenth century, when growing disapprobation of the more extravagant forms led to their discouragement ; whilst statute has made money staked by way of gaming or wagering in general irrecoverable. Many European systems also deprive wagering contracts of legal force.

All systems of law make provision for relief against contracts, performance of which is impossible. Impossibility may be either physical or legal. By a physical impossibility is meant something contrary to the natural order of things, as understood at the time when the contract is made. Thus, the favourite example of impossibility given by the Romans was a promise to touch the sky with one's finger. This would probably not be considered an impossibility nowadays. Similarly a promise to circle the globe in forty days, though impossible a century ago, is not so to-day. Legal impossibility is impossibility resulting from the fact that the power of performance is prevented by law. Thus a contract to sell the Forum in Roman law was a legal impossibility.

Impossibility supervening between the time when the contract was made and the time appointed for its performance may affect the position of the parties. The most common example of this occurs when, in a sale, the thing sold ceases to exist before the

¹ *Thacker v. Hardy*, 4 Q.B.D. 685.

sale is complete. In Roman law, the rule was that if impossibility was not the result of the wrong-doing of the party bound, he was released from liability, but in sale, though the vendor was no longer bound to deliver, the purchaser must still pay the price, in accordance with the rule *Res perit domino*.

In English law, supervening impossibility as a good defence to an action for performance or damages is of recent origin. In *Paradine v. Jane*,¹ Paradine sued Jane for rent due on the lease of a house, from which Prince Rupert had expelled him during the Civil War. It was held that Jane must pay the rent, since it had been within his power to protect himself against such a situation by means of a clause in the lease. In *Taylor v. Caldwell*² the defendant let a music-hall to the plaintiff for a concert, and before the day arrived, the hall was destroyed by fire. Here it was held that such a contract was made subject to the implied condition that performance was excused if the thing ceased to exist before the date fixed for performance. Such an implied term excusing performance is now implied in contracts where performance becomes impossible (1) through a change in English law; (2) through the destruction of the subject-matter of the contract; (3) because an underlying set of circumstances, which formed the sole reason for the conclusion of the contract, ceased to exist; (4) because supervening circumstances have rendered it impossible for performance to occur within the time fixed by the parties, when the delay is so long as to destroy the identity of the work with the work in the form in which it was when interrupted; or (5) through the death or illness of the party bound, where the contract is for the performance of personal services of a special nature by him.

5. THE CREATION OF RIGHTS "IN PERSONAM"

The meaning of this has already been made clear. Where the agreement results in a modification of rights *in rem* (e.g. in a sale of goods for cash), this is a contract in the wide sense. There remain no rights *in personam* outstanding between the parties. Only where one party is bound to perform some specific act or forbearance towards the other is the agreement a contract properly so called.

II. QUASI-CONTRACT

This expression was used by Justinian to group together a number of legal relations, creating obligations between the parties

¹ Ayley, 26.

² (1863), 3 B. & S. 826.

but which did not arise out of contract or delict, but resembled contracts in some respects. Professor Buckland is unable to discover any principle linking the examples given.¹ Contracts are the product of an agreement between the parties, creating a given set of circumstances. Quasi-contracts do not result from agreements, but depend upon the relative situations of the parties, *i.e.* upon events not completely subject to their control. They are obligations imposed by law in such circumstances that it would be unfair for one party, in view of what has happened, to rely upon his more powerful position in respect of the other. The principal examples in Roman law were *Negotiorum Gestio*, a supervision of another's affairs, in such cases as supervision was necessary, although without the other's authority; *Common Ownership*, where the resulting rights and liabilities resembled those arising out of partnership; and *Condictio Indebiti*, which gave a right to recover by action money which had been paid to another by mistake. In English law, the two most important bases of quasi-contractual liability are for money paid by mistake or unjustly retained, and on a *quantum meruit* for work done or services given.

III. DELICT

It must first be noticed that the Roman *delict* is not by any means synonymous with the English tort. A delict was a breach of a right *in rem*, giving rise to an action for a penalty, as well as, in many cases, an action for the restoration of the thing involved. Delict therefore included, right down to the time of Justinian, theft and robbery, which in modern systems are excluded from private law altogether, and are considered as crimes. Delict in Roman law was therefore of ancient origin (several types antedate the XII. Tables), and the resultant rights were considered as a substitute for the personal activity of the injured party against the wrong-doer, which is characteristic of early law. Since delict can thus be traced back to the idea of private revenge, liability did not lie against the heir of the wrong-doer; and again, *capitis deminutio* of the wrong-doer did not affect his liability for delicts.²

A tort, in modern English law, is a wrong arising through the breach of a duty imposed by law (and not solely comprising a breach of contract or a breach of trust), the appropriate remedy for which is an action for damages. This is a comparatively late conception in English law. The State, as soon as one existed, undertook to repress certain wrongful acts inimical to its welfare.

¹ *Text-Book*, p. 533.

² Buckland, p. 571.

These became crimes. Private injuries not threatening the public peace, however, were left unremedied legally for a period longer. As a matter of fact, early English law was unable to distinguish clearly for a period between wrongs resulting from breaches of contract and wrongs which become known later as torts, and actions for both contract and tort developed in the first instance out of a modification of the most famous of English writs, the Writ of Trespass, the modification being termed Trespass on the Case, or, more shortly, Case.

The essence of the Writ of Trespass was that A alleged that B, *vi et armis et contra pacem domini regis*, had interfered with A's land, body, or goods. It involved, therefore, the idea of forcible interference. In Case, however, whilst a similar allegation was made, the *vi et armis* clause was omitted, so that the action became generally applicable to interferences with another to his detriment. One great branch of Case developed into *Assumpsit*, which became the general action for enforcing contracts not under seal. If A undertook to do something for B, and acted so wrongly that damage to B resulted (malfeasance), he was liable because he had undertaken (*assumpsit*) the service; later, the same remedy was extended to cases where A, having again undertaken to perform services for B, failed to fulfil his promise (nonfeasance). Apart from these contractual actions, however, Case also gave rise to Trover, a remedy for cases in which the plaintiff alleged that he had casually lost the chattel, which had come into the hands of the defendant, and by him had been converted to his own use; Malicious Prosecution; and Nuisance.¹ Some torts, however, have a different origin. Thus slander was at first actionable in the local and feudal courts. When these decayed, the Church Courts assumed jurisdiction, while the King's Courts interfere for the first time in the sixteenth century. Libel, on the other hand, was an offence cognisable in the Star Chamber as a criminal proceeding, though in Stuart times, damages could also be awarded. On the abolition of the Star Chamber, jurisdiction was transferred to the King's Courts, the wrong being remediable both criminally and also civilly as a tort.

The divisions Tort, Crime, and Breach of Contract are not mutually exclusive. The distinction depends upon the antecedent facts. If A slanders B, that is a wrong which is exclusively a tort. No other remedy has been provided for the offence by law. A libel of B by A, however, may give rise to criminal or civil proceedings. Again, if A agrees to deliver goods to B, and fails to do so, B may sue A for breach of contract, but not for a tort. On the other hand, if A, being a physician, under-

¹ See Maitland, *The Forms of Action*, Lectures V. and VI.

takes to attend B professionally, he also undertakes to employ, in respect of B, customary medical skill. If he fails to do so, B may sue A for breach of contract, or alternatively for damages. If, further, B's negligence was so gross that A lost his life as a result of it, B might also be criminally liable for manslaughter.

The term "Tort" in English law is unquestionably a residuary term. New grounds of action arise frequently. Thus negligence is frequently treated in modern English law as a distinct tort, whilst liability in respect of Workmen's Compensation, or under the Fatal Accidents Acts, is also said to be in tort, although the liability to pay compensation may arise in each case through no fault of the employer. Under these circumstances it seems unnecessary to emphasise the fact that no *mens rea* is required for the commission of a tort, as it is for a crime.

Certain sets of circumstances exempt an individual from liability in tort. A person who consents to injury which is done to him may not sue for it (*volenti non fit injuria*). Thus a footballer cannot complain if he is injured during the progress of a game, if the rules were being observed. Again, an individual is not liable for the consequence of an accident, *i.e.* an unforeseen interference with a lawful act done by A, which is caused by circumstances beyond the control of A. Further, if injury is done by a person in defence of himself or his property against unlawful aggression, he is not liable in tort, so long as he uses no more than reasonable force to repel it. Finally, torts committed in furtherance of the public welfare may sometimes be excused, whilst a tort committed in pursuance of statutory direction is not actionable, if the statutory authorisation is clear.

In English law, as in Roman law, the maxim *Actio personalis moritur cum persona* formerly had particular application to torts and delicts, but English law now admits several exceptions to this rule. Thus, a tort which is also a breach of contract causing pecuniary loss will survive the death of the injured party. Again, where one person appropriates wrongfully the property of another, this may be recovered, even though one or both of the parties has since died. Thirdly, under a statute of 1331, executors and administrators may sue for injuries done to the personal estate of the deceased; whilst the Civil Procedure Act, 1833, permits executors and administrators to sue for any injury done to the real estate of the deceased in six months preceding his death, provided that the action is brought within a year after the death; and the same act also makes administrators and executors liable for injuries done by the deceased to another's real and personal property in the six months preceding his death, provided that the action is brought within six months after the death.

IV. QUASI-DELICT

This expression is used by Justinian to denote a group of relations which would now be classed simply as delictal. They are all examples of vicarious liability, and include the following :

(a) *Judex qui litem suam facit*.—The unjust or careless judge was liable to the party injured. Here he is regarded as taking over the liability of the person whose cause he has favoured.¹

(b) *Res dejectæ vel effusæ*.—A householder was liable for damage caused to a passer-by or his property as a result of things being thrown from his window.

(c) *Res suspensæ*.—This was a similar ground of liability in respect of things suspended from a building over the road, and which, in falling, caused damage.

(d) *Nautæ cauponæ stabularii*.—The master of a ship, or the manager of an inn or public stable was liable for damage done by employees.

These quasi-delicts reappear in some modern systems of law based on Roman law. English law does not include quasi-torts as a distinct class, regarding the term "tort" as sufficiently wide to include these special bases of liability. It might conceivably be applied, however, to modern statutory torts in which liability is imposed, although there has been no failure in duty on the part of the person liable.

¹ Buckland, p. 594.

40.—PRIVATE LAW: THE LAW OF PROCEDURE

THE Law of Procedure is frequently termed “adjective law,” since it is that portion of the law by means of which the remaining portion—the “substantive law”—is enforced. In modern systems it is often a complex and highly technical system. In primitive law, on the other hand, it scarcely exists. The injured person himself, with the assistance of the family or clan, ensures redress of his injuries, and it has already been pointed out that all the authority of the infant State can attempt to do is to regulate the vengeance which custom permits. At a later stage of development, when the authority of the federation of clans has been replaced by the authority of a single individual, the king or chief, the enforcement of right is undertaken by the king or chief himself. This is the stage reached by the Jews in the time of Saul, David, and Solomon, traditional accounts of whose judgments are recorded from time to time.¹ It is also the stage of development attained by the Greeks at the period depicted in the *Iliad*. The kings administer justice in person, dispensing *Themistes*.² The only procedure which exists is that by virtue of which the subject’s complaint is brought before the king.

Eventually, however, the monarch is replaced by an aristocracy. Coincidentally an important change occurs in the law itself. It becomes more technical, whilst its exposition and application is committed to a priestly order. The letter of the law is more important than its spirit. Thus, in Icelandic Saga, the knowledge of the law is committed to a few wise men, whose opinion upon a dispute is authoritative, and who alone know the true forms of procedure. In Roman law we have the *legis actiones*, five in number—*sacramento*, *per judicis postulationem*, *per condictionem*, *per manus injectionem*, *per pignoris capionem*—within the boundaries of one of which all legal proceedings must be initiated, the form being followed with scrupulous fidelity; and Gaius adds: “Thus, a man who sued another for cutting his vines, and in his action called them vines, irreparably lost his right, because he ought to have called them trees.”³

¹ Cf. 1 Kings iii. 16–28. The same story also appears in early Chinese and Japanese legends.

² See Maine, *Ancient Law*, chap. i.

³ IV. ii.

The history of Roman legal procedure depicts a constant endeavour to attain increased flexibility. The *legis actio* system was unsuited to the needs of a community whose social development was taking place so rapidly. Further, the *legis actiones* had been one source of power to the patricians, since a knowledge of them had been confined to the magistrates and the pontiffs, who were at first exclusively patrician. When all offices were opened to plebeians, and when the forms of action were made public between 300 B.C. and 250 B.C., only the inconveniences of the system remained. The Prætors, therefore, in their remarkable development of Roman law through the Edict, elaborated a newer system—the Formulary System. As under the older system, the parties appeared before a magistrate and stated the grounds of the dispute; but whereas under the *legis actio* system the proceedings before the magistrate simply consisted in a recitation of certain set forms, under the Formulary System the substantive ground of claim was investigated, and if the magistrate considered the complaint a suitable one for decision before a *judex*, he constructed a *formula* of instructions, stating the issue, and directing the *judex* to frame a decision in accordance with the facts. When once the nature of this procedure had been realised, the Prætor's influence upon the whole body of law was immense. He was free to grant a *formula*, or to refuse one; and so, in effect, to create a new right or deny one. Further, he could admit defences which the older system ignored altogether, such as a set-off, or a *naturalis obligatio*. By *actiones utiles* or *in factum*, he could widely extend the boundaries of existing remedies for wrong-doing, so that a technical statute of restricted scope, such as the *Lex Aquilia*, became a most comprehensive basis of liability for injuries of all kinds to person or property.

The Formulary System is essentially a system adapted to the needs of a youthful, rapidly expanding body of law, developed by a body of powerful officials, independent in outlook. In a mature system, the boundaries of private right and duty have become fixed, with some pretence to finality, and the need for new remedies no longer exists. To create new *formulae* when private rights are already sufficiently protected by existing ones leads only to complexity. This led to the decline of the Formulary System in Rome; but there was also another reason. It has already been pointed out that the Prætor, in creating new remedies, was really creating a new body of substantive law as well. When the Empire replaced the Republic, however, such an exercise of uncontrolled legislative power would be incompatible with the position of the Emperor. The work of the Prætors was accordingly consolidated by Julianus in the time of Hadrian, and their

activity in constructing new *formulae* ceased. Subsequently the system itself was replaced by another—the *extraordinario cognitio*—which differed from its two predecessors in having one stage only, before an Imperial official, and no longer before a powerful magistrate and a private citizen. The Imperial official was a civil administrative officer with some legal training, and he was frequently assisted by skilled assessors. He himself, and not the plaintiff, ensured the defendant's answer to the summons to Court, and from his decision lay an appeal to a higher official, and so ultimately to the Emperor himself. In fact, the whole proceedings represent a change from the conception of a trial as a joint appeal to the impartial authority of the magistrate for decision, to the conception of an efficient and highly complex administrative organisation regulating the affairs of private citizens with the object of ensuring the fullest respect for private rights. Just as the Emperor, as the sole author of substantive law, was the source of all private rights, so, as the head of the State's organisation of tribunals, was he the fountain of all justice.

It has been remarked that early legal procedure, once the period of personal administration of justice by the king has been passed, is highly technical. One of the reasons for this is that, since the initiation of the proceedings is in the hands of the parties, and not of the State, it is necessary in the interests of the public peace to prescribe in detail what steps a plaintiff may take to secure the appearance of his opponent in Court. Thus the XII. Tables says: "*Si in jus vocat, ito. Ni it, antestamino. Igitur em capito. Si calvitur pedemve struit, manum endo jacito.*" Further, even the execution of judicial decrees is largely in private hands, and it is the sole province of the State to regulate, as far as possible, the desire of the injured to perform violence upon the offender, and to define the extent to which he may interfere with him, in satisfaction of his vengeance. So it is that we find in the XII. Tables provisions authorising the *lex talionis*, and also *manus injectio*, and further severities upon a recalcitrant debtor by his creditor.

The same characteristics are prominent in the early English codes. Thus the laws of Hlothaire and Eadric (c. A.D. 680) provide: "If one man make plaint against another in a suit, and he cite the man to a 'methel' or to a 'thing,' let the man always give 'borh' to the other, and do him such right as the Kentish judges prescribe to them."¹ The Secular Ordinance of King Edgar states: "And let every man so order that he have a 'borh'; and let the 'borh' then bring and hold him to every justice; and if any one then do wrong and run away, let the 'borh' bear

¹ Stubbs, *Select Charters*, p. 61.

that which he ought to bear. But if it be a thief, and if he can get hold of him within twelve months, let him deliver him up to justice, and let be rendered unto him what he before had paid.”¹

The laws of Ethelred (978-1016) provide: “If the frithbreach be committed within a ‘burh,’ let the inhabitants of the ‘burh’ themselves go and get the murderers, living or dead, or their nearest kindred, head for head. If they will not, let the ealdorman go; if he will not, let the king go; if he will not, let the ealdorodom lie in ‘unfrith.’”²

Finally, in the laws of Canute we find the provision: “And let no man take any distress either in the shire or out of the shire, before he has twice demanded his right in the hundred. If at the third time he have no justice, then let him go at the fourth time to the ‘shire-gemot,’ and let the shire appoint him a fourth term. If that then fail, let him take leave either from hence or thence, that he may seize his own.”³

There are many other illustrations of the same point of view in these early codes. Although the State, in the development of law, tends more and more to assume complete control over its administration, there remain, even to-day in modern English law, one or two survivals of self-help, in the right of self-defence, the right to retake goods of which a person has been unlawfully dispossessed, the landlord’s right of distress, and also the right of an occupier of land to distrain upon trespassing cattle *damage feasant*.

Even after the Norman Conquest, the State in England did not assume complete control over legal proceedings for some centuries. On the one hand there was the appeal of the parties to God in compurgation and the ordeals. Here the issue is deemed to be beyond the power of mortal solution, and supernatural intervention is invoked. On the other hand, the private fight of the earlier period still survives, and the State can do no more than regulate it. If one man accuses another of crime, there is the appeal of felony, one of which survived in theory until the nineteenth century, when it was dramatically revived in *Ashford v. Thornton*. If the suit concerned title to land, there was again trial by battle. How dangerous the toleration of private warfare as a form of legal process might prove to the State upon occasion is well illustrated by the quarrel between the Dukes of Hereford and Norfolk in the reign of Richard II. When the Duke of Norfolk accused the Duke of Hereford of treason, and trial by battle was claimed, the repercussions of the combat seemed likely to shake the security of the throne itself, and the king was compelled to deviate from the strict rules of the laws of

¹ Stubbs, *Select Charters*, p. 71.

² *Ibid.* p. 72.

³ *Ibid.* p. 73.

chivalry, and by an exercise of his own sovereign authority, both combatants were exiled. The appeals of felony were slow in falling into disuse, however, and instances are not unknown in the middle of the fifteenth century.

The reform of legal procedure in England illustrates how the authority of the State has superseded the activities of the parties themselves to a dispute in the control of the proceedings. The reign of Henry II. is always associated with the introduction of trial by jury in civil and criminal cases, in place of the ordeals (now fallen into disuse since the Papal Bull of 1215) and the appeals, and trial by battle. Henry did not consider it expedient to arrogate to the State a monopoly of legal procedure. This would have had the ultimate consequence of alienating all disappointed litigants. By introducing a lay element, however—the jury of neighbour witnesses, as they were in origin—he threw responsibility for the actual decision upon the facts in issue upon the neighbours, leaving it to the State to pronounce a fitting judgment upon the findings. This union of professional and lay elements in the administration of justice has become a characteristic of most modern systems. It is not without its disadvantages, since an intricate question of commercial law may require far more laborious explanation for the benefit of “the twelve good men and true” than would be necessary for the comprehension of a professional judge assisted, as he may well be, by commercial assessors. Again, there is always the possibility that jurymen may disagree. For this reason there is a tendency for parties to civil suits to prefer trial before a judge, without a jury. Further, a jury may be unduly influenced by prevailing prejudices within the community from which they are drawn. This defect is most conspicuous in periods of political stress. Thus, in Ireland during the existence of the Union, it has frequently been impossible to secure convictions for crime in spite of the existence of the plainest evidence. This was probably due, to a considerable extent, to a common race, religion, and political sympathy existing between the accused and the jurymen, but it has frequently been due to other causes as well. Thus, since the establishment of the Free State, the intimidation of juries has been one of the most important problems which the Irish Ministry of Justice has been called upon to solve.

Notwithstanding these defects, the jury of laymen remains an important and necessary element in a modern tribunal, more especially in criminal trials. It affords some guarantee to the accused against arbitrary State action, more particularly when the crime has a political origin. In Stuart times, the right, founded upon the provisions of Magna Carta (which may or may

not relate to trial by jury), that no free man shall be imprisoned for an offence until he has been proved guilty to the satisfaction of twelve fellow-citizens, was considered to be one of the few remaining safeguards of the subject against encroachments by the Crown. Again, the jury has, upon occasion, been made the instrument in virtue of which important extensions of English law have been accomplished. Thus the incorporation of large parts of the Law Merchant into English law in the eighteenth century by Lord Mansfield was effected through the co-operation of trained commercial jurors.

Another consequence of the assumption of control by the State over legal procedure is the development of a class of professional lawyers. The physical compulsion placed upon one litigant by another in early law does not admit the possibility of representation. A maturer system, however, requires interpretation, not only by the judge, but by those who seek its aid. In early times, it is necessary for the litigant to have recourse to some priestly order, or (as was the case in Iceland) certain hereditary wise men to whom alone is given full knowledge of procedure. When the forms of legal process are made public, however, it is inevitable that some particular class should devote itself to a mastery of these forms, and that their activities should eventually be recognised, and even welcomed by the tribunal itself. It has become clearly recognised in English law that a judge now expects that the law applicable to the suit before him shall be adequately expounded by counsel. The relations existing between Bench and Bar have not always been so harmonious, however. Thus, in ancient China, lawyers were not admitted to the Courts, though it was notorious that they rendered advice to clients, and exacted fees for so doing. Accordingly, the Chinese Code of the Ts'ing Dynasty provides that "the person who draws up the information for the prosecutor, and by any aggravation or extension deviates from the truth, shall be liable to the same punishment as the false accuser," whilst the profession in general ranked with the lowest orders in the community.

In Rome, the publication of the XII. Tables gave rise to the college of pontiffs, skilled in the procedure of the decemviral legislation. After the publication of a formulary of actions by Cn. Flavius in 304 B.C., however, the influence of the pontiffs was greatly diminished, and when the pontifical college was at length opened to plebeians, their monopoly of the forms of action was at an end. They were soon followed by a succession of secular jurists of eminence, who not only spent a considerable portion of their time in expounding the principles of the substantive law, but also advised clients upon the niceties of legal

procedure. In court, however, the parties were represented, when representation was permitted, by orators, who were not necessarily skilled lawyers, and of whom Cicero is the most noteworthy example.

In English law, the legal profession has a more martial origin. In the most important lawsuits after the Norman Conquest, the issue was decided by means of a judicial combat between the parties. Certain persons, *e.g.* women, minors, the aged, and the infirm, could hardly be expected to take part in these, and accordingly the idea of representation, by hired "champions," was admitted. In the early part of the thirteenth century the idea was extended to others. The champion disappears, however, with the judicial combat; and in the powerful Royal Courts, with ever-growing jurisdictions, of Henry II. and his successors, the serjeant-at-law, with his apprentice, and the attorney make their appearance.

The serjeants, already a close order at the end of the thirteenth century, were organised in their own Inns, and enjoyed special privileges in court—notably, the right of exclusive audience in the Court of Common Pleas, and a monopoly of judicial appointments. Below them were the "utter barristers," composed of their apprentices, who had been licensed by the serjeants to practise. The King's Counsel were of later date, the institution originating at the beginning of the seventeenth century.

The order of attorneys also has its origin in the thirteenth century, when parties to litigation were permitted to send representatives on their behalf to the local courts. This privilege was extended afterwards to other courts, and the growth of the jurisdiction of the Court of Chancery gave rise to another type of professional agent, the Solicitor. There was also another order, of Scriveners, who were concerned exclusively with non-litigious business.

For purposes of social intercourse, all members of the profession (except the serjeants, who had their own Inns) mingled together in the Inns of Court and, in certain lesser and affiliated foundations, the Inns of Chancery, until the second half of the eighteenth century, when two important changes occurred—attorneys and solicitors established the rule that lay-clients could be approached only through an attorney or solicitor, whilst they themselves were excluded from the Inns of Court, and were confined to the Inns of Chancery. From this has resulted the fundamental division of the legal profession in England into counsel, who have the right of audience in practically all judicial proceedings, and an exclusive right of audience in the High Court of justice and all superior courts; and solicitors, through whom

alone the client may approach counsel, and who may themselves appear as advocates in practically all courts of inferior jurisdiction. The utility of this distinction is far from generally admitted, and although there is no immediate prospect in England of the amalgamation of the two branches of the profession, the same division of function does not exist among continental lawyers, nor in the United States.

The function of the professional lawyer may be described shortly as the furtherance of his client's interests in the matter put before him, and if litigation is necessary, to present the issue before a tribunal in the strongest and most favourable light. Before the actual trial occurs in court, it is necessary for the parties to decide what is the exact point or points in issue. In Roman law, under the Formulary System, this was usually achieved by the appearance of the parties before the Prætor and the subsequent drafting of a formula, covering the points in dispute. Under the later system, of *extraordinaria cognitio*, the plaintiff made a written statement of claim (*libellus conventionis*) to a magistrate, drawn up with professional advice, to which the defendant made a written defence (*libellus contradictionis*). This is, in substance, the form followed in all modern procedures. Thus, in English law, the plaintiff makes a written statement of claim, to which the defendant replies. He may traverse the claim, *i.e.* deny the allegations of the plaintiff simply. Alternatively he may admit some or all of the facts, but allege others, altering their legal effect. This is termed confession and avoidance. Again, he may raise an objection in point of law, declaring that even on the facts which the plaintiff alleges, the plaintiff is not entitled to the remedy claimed. Lastly, the defendant may counterclaim in respect of certain facts which he alleges in respect of the plaintiff.

When these issues have been defined to the satisfaction of the court, they are brought to trial in open court. Since the essence of the administration of justice in modern times is strict impartiality between the parties, the object of the rules of procedure is to place them as far as possible upon an exact equality in the successive stages of the trial. Formerly, where the State was a party, as in the administration of the criminal law, this was not so, and in England, the position of a person accused of treason or felony was disadvantageous in the extreme. In treason, the accused was not entitled to see a copy of the accusation against him, and in treason and felony, the accused could not call witnesses in his own defence, nor was he entitled to be defended by counsel, except in the argument of points of law. The last two disabilities were removed in 1702 and 1826, and the State has been placed virtually in the position of any other litigant, although a few

exceptional privileges still remain, even in civil suits. Thus, discovery of documents necessary for the action cannot be ordered against the Crown, whilst the form of procedure in civil suits is by "petition of right." It is possible, however, that these privileges will shortly disappear.

In the trial in court, the legal representative of each party presents his case by stating the facts upon which he relies, and then bringing forward evidence in support of the facts. Evidence may be material, *i.e.* consisting in objects (*e.g.* documents) relevant to the issue, but the greater part of it is usually made up of the oral testimony of witnesses. To the regulation of such oral testimony, all codes of procedure devote a good deal of attention. In the broadest sense, all human conduct is evidence, since it is impossible to separate any human act from its surrounding circumstances; but it has been necessary for courts of law to set an artificial limit, and to admit as evidence only that testimony which materially bears upon a fact in issue. Again, certain classes of testimony are now generally excluded from evidence completely. Most important of these classes is hearsay evidence. This is due partly to a desire to limit the issue, but also to the known circumstance that hearsay evidence is frequently inaccurate, and, like a snowball, becomes the more formidable the farther it travels.¹ Formerly, it was otherwise, and in some continental countries it is even now admitted, subject to restrictions. In the trial of Calas in France, in 1762, the prisoner was convicted of murder on seventh-hand testimony. Even English law admits hearsay evidence in some special circumstances, *e.g.* where the statements are admissions by the party against whom they are produced, or where statements have been made regarding pedigree or public rights by persons deceased at the time of the trial.

Formerly in criminal trials and, in some systems (*e.g.* Roman and Chinese law), even in some civil suits, torture was used to extract confessions from prisoners, and in some cases also to extract testimony from witnesses. The Romans had an implicit belief in the efficacy of torture, and its application was erected into a fine art in Europe during the Middle Ages, in spite of the known readiness of human beings to make the most inaccurate admissions to end their sufferings. Generally speaking, torture as an incident of judicial process did not survive the French Revolution in Europe, although instances are recorded in Italy and South America in the nineteenth century. In England, the use of torture was never admitted by the common law, although it was applied at the direction of the Star Chamber. In Asia, torture

¹ Another reason may be found in the undue importance which juries attach to this form of evidence.

was applied to accused and witnesses indiscriminately, and in China the abuse of judicial torture was one of the main obstacles to the recognition of Chinese jurisdiction by foreigners.¹

Modern courts of law have full control over their procedure. In English law, the Judicature Act, 1875, and subsequent statutes empowered a Rules Committee of the High Court to frame rules of procedure, and these, when framed and promulgated, have statutory force, being, in fact, an example of subordinate legislation. The same committee has power to amend the rules it frames. The courts have also power to enforce order during the progress of proceedings, and all superior courts may proceed even to the length of fining or committing offenders for contempt. A contempt is committed, *inter alia*, when any person attempts to influence the progress of a trial to the detriment of one party, *e.g.* by the publication of comments thereon in a newspaper.

It is obvious that since modern legal systems are complex, and judges are only human, judicial decisions are not infallible. To minimise miscarriages of justice, therefore, there is a provision in all modern systems for either party to appeal from the judge of first instance to a higher tribunal. In Roman law, under the formulary system, it would appear that the decision of a *judex* was final, although he was personally liable to the injured party for a miscarriage of justice. Under the *extraordinario cognitio* system, however, a graduated system of appeals from the judge of first instance to the Emperor was established, and a similar system existed in Imperial China, where a suit might be appealed from the local prefect to the provincial high court, and thence to the supreme supervisory tribunal at Peking. The difficulty is always to establish sufficient appellate tribunals to reduce the possibility of legal error almost to vanishing point, without at the same time providing for undue uncertainty, delay of justice, and excessive costs. In England, it was proposed in the Judicature Acts to establish a High Court, including a Court of Appeal, and to abolish the jurisdiction of the House of Lords as the Court of Final Appeal; but this proposal was not carried out, with the result that a trivial claim for damages may in some cases be decided in a county court and thence appealed successively to a division of the High Court, to the Court of Appeal, and the House of Lords. It may be questioned whether this is not a too liberal provision for appeal.

In the administration of criminal justice there was formerly in England too little provision for appeals. The decision of the judge of first instance was final, except on points of law, when it was possible to appeal to the Court for Crown Cases Reserved.

¹ See Keeton, *Extraterritoriality in China*, vol. i. chaps. ii. and iii.

Miscarriages of justice occasionally occurred under this system, culminating in the case of Adolf Beck, in which an accused was twice wrongly identified and convicted of crimes of which he was innocent. To guard against similar defects in future, the Court of Criminal Appeal was established in 1907, to which any person convicted of crime may appeal on any question of fact or law, with the possibility of a further appeal, on questions of exceptional public importance, to the House of Lords. To provide against purely frivolous appeals, the Court was given power to increase sentences if it thought fit—a power which has been used.

It remains only to notice the general influence of the courts upon the development of a legal system. It has been pointed out in considering judicial precedents, that judges, in deciding cases even to-day, frequently add to the body of the substantive law. In the formative period of a legal system, their influence is much more important and direct. In Roman law, the Prætor created an entirely new body of law through his power to grant and withhold *formula*. To grant a *formula* on a new set of facts was really to create a new right. So the *jus honorarium* supplemented and modified the *jus civile*. To take but one example, the Prætor created a new Law of Intestate Succession through his grants of *bonorum possessio* to classes of people not favoured by the *jus civile*. Similarly, in mediæval England, actions were only begun upon the grant of a royal writ from the Chancery, and in the century between 1150 and 1250 a great number of new forms of writs were constantly issued by the officials of the Court of Chancery. Some of these were denied recognition by the common law judges, but those which were recognised afforded legal protection to all whose claims could be included within their terms, so that it became technically true to state that, when there existed a remedy, there also was a right, or alternatively, “no writ, no remedy.” So powerful, indeed, was this law-making power of the officials of the Chancery and the judges deemed to be that it was regarded with some suspicion, and was confined within narrow limits towards the end of the thirteenth century, and finally, in 1285, the Second Statute of Westminster declared that henceforth the clerks in Chancery shall only issue writs *in consimili casu*; from which provision, in turn, the great writ of Case, the foundation of the modern law of contract and tort, originated.

When this form of law-making by the court was exhausted, there arose in turn the Court of Chancery with its new remedies for injured persons, for whose complaints the common law courts provided either an inadequate remedy or no remedy at all. From this arises our modern Equity.

Surveying this important development, therefore, it is impossible to regard substantive law and procedure as two distinct branches of the law. Procedure exists only for the furtherance of the substantive law, but its very existence inevitably extends the substantive law itself.

41.—INTERNATIONAL LAW

“INTERNATIONAL Law,” wrote the Marquis of Salisbury in a letter to *The Times* for 26th July 1897, “depends generally on the prejudices of the writers of text-books”; but the Marquis, like his contemporary, Bismarck, was too great a lover of arbitrary State-action to be inclined to estimate international law at its true worth, and in consequence his statement is somewhat biased. Nevertheless, it contains a fundamental truth. International law owes its origin, in the form in which we possess it to-day, to the writers of text-books; and by the same agency the infant science was nurtured into healthy youth. Rules regulating international relations certainly existed long before text-books about them; but it was, and remains, the jurists who elevated them into a coherent, effective system.

When we come to discuss the origin of international law, we find ourselves among the mass of ideas left derelict by the Middle Ages in the intellectual sea of the Renaissance; a mass of ideas from which each jurist selects one or more and then erects his system about it. One thing at least is clear. So long as the “dead hand of the past,” in the form of mediæval conception of Christendom as a single State-Church, still persists, the modern European system, as we know it, is impossible. No equality was possible between an Emperor or a Pope, and a ruler whose theoretical status, no matter how shadowy, was that of a rebellious vassal. The first necessity, therefore, was for states to become absolute and independent. As Sir Henry Maine puts it: “If sovereignty had not been associated with the proprietorship of a limited portion of the earth, had not, in other words, become territorial, three parts of the Grotian theory would have been incapable of application.”¹ This seems almost a modest estimate. We might, indeed, go further and assert that the scheme of Grotius would have been altogether impossible. It certainly was a century and a half earlier. Many people helped to destroy the unity of Christendom. Columbus had a good deal to do with it, for the Imperial authority which could not exact obedience from Europe was obviously incapable of controlling the European possessions in America, whilst the Papal Bull dividing the New World between Spain and Portugal was ignored by the rest of

¹ *Ancient Law*, p. 114.

Europe. Again, Luther, by finally splitting the Christian Church into two hostile camps, ended papal pretensions to European overlordship, whilst Machiavelli wrote a treatise on Government which ignored religion, and exalted the ruler. This exaltation of the ruler paved the way for modern doctrines of State-sovereignty, to which added impetus was given by the sixteenth-century wars of religion in Germany, from which the more important German princes emerged virtually independent of Imperial authority, and unquestioned masters within their own territories. Similarly in Western Europe—in England, France, and Spain—Renaissance despots placed themselves at the head of modern nation-states, and prepared the way for the modern doctrine of the legal equality of states, finally ending all Imperial claims to overlordship. Henceforth the Emperor was simply *primus inter pares*. At the same time, in all countries in Europe, philosophers, jurists, and pamphleteers were slowly feeling their way towards the conception that the authority of the State within its own borders is absolute, and its activities externally uncontrolled by anything beyond the threat of hostile superior force. This view is finally put forward in reasoned and logical terms by the French jurist, Jean Bodin, the source of all modern theories of State sovereignty.¹

It will thus be evident that the Renaissance philosophers, when dealing with the science of politics, had broken down the conception of Europe as a federation whose principal officers were the Pope and the Emperor, and had erected instead a theory of society comprising many independent states in which territoriality and complete sovereignty were characteristics of the first importance. This reduced these political communities to a "state of nature" in a double sense. Theoretically, it completely avoided the operation of any except natural law between states, and in practice it resulted in a system closely approximating to Machiavelli's, and consciously modelled upon it. In consequence, warfare during the Renaissance period, and until the Peace of Westphalia, was more brutal than it had been since the barbarians had overrun Europe a thousand years earlier. The Sack of Rome by Charles v. in 1527 illustrates it, and the long-drawn-out agony of the 'Thirty Years' War reduced Europe to sullen despair. "I saw," writes Grotius in his Prolegomena to *De jure belli ac pacis*—"I saw prevailing throughout a Christian world a licence in making war of which even barbarous nations would have been ashamed, recourse being made to arms for slight reasons or no reasons at all; and when arms were once taken up, all reverence

¹ See further, Eastwood and Keeton, *The Austinian Theories of Law and Sovereignty*, chap. iii.

for divine and human law was thrown away, just as if men were thenceforth authorised to commit all crimes without restraint." Small wonder, therefore, that any scheme for moderating the effects of war was accorded the warmest of welcomes. It must not be imagined, however, that Grotius was the only writer to protest against the brutality of war. Complaints may be discovered in innumerable contemporary and earlier works, and projects were not lacking to abolish war, or at least to modify its effects. So early as 1504 Erasmus, in his panegyric to Philip of Burgundy, condemns a European system which involves such a vast amount of human slaughter periodically, and again in 1517, in his *Complaint of Peace*, he points out the iniquity of war, and propounds a scheme for its abolition foreshadowing that of Sully. Two years later, in *The Praise of Folly*, he renews the subject, and denounces a fighting pope and a papal war as a hideous travesty in a Christian Europe. Sully, the Minister of Henri iv., in *Economies Royales* propounded a curious scheme, the "great design," by which Europe was to be divided into fifteen equal states, whose equality and mutual relations would make it impossible for any of them to endanger the safety of the others. A feature of the scheme was a plan for arbitration to prevent war. The project was too visionary for it ever to become a question of practical politics, but it had a political object as well—namely, the limitation of the power of the Hapsburgs, who at this period overshadowed Europe. In this respect it is an endorsement of the policy of Wolsey—a policy which is meaningless unless it is considered as a practical exposition of the theory of a "balance of power."

Hugo Grotius (or van Groot), the Father of International Law, was born at Delft in 1583. At the age of eight years he wrote Latin verses, and at twelve years of age he composed a Greek ode in praise of William of Orange. His university career at Leyden included the study of mathematics, jurisprudence, and philosophy, and terminated at the somewhat early age of fourteen. Forsaking the University for the Bar, he won considerable fame as an advocate and still more as a jurist for the composition of a treatise *De Jure Prædæ*, in defence of the Dutch East India Company, then in conflict with the Portuguese in the Straits of Malacca. This was written at the age of twenty-two, and four years later a chapter of it—*Mare Liberum*—was published. This work was refuted by Selden in 1635 in *Mare Clausum*. At this period Grotius was also publishing works on an exceedingly wide range of subjects, including Greek and Latin translations, law, history, theology, and philosophy. At the age of thirty-three, he became Grand Pensionary of West Friesland and Holland, and shortly

afterwards was associated with John Barneveldt in a political movement directed against the Stadtholder, Maurice of Nassau. On its failure, Barneveldt was executed and Grotius was imprisoned for life. He escaped through a stratagem and the devotion of his wife, who carried him from his prison in a basket which theoretically contained a number of books whose utility the insatiable scholar had exhausted (1621). For ten years he lived in Paris, and in 1625 produced his great work, *De jure belli ac pacis*. Finding the rule of Richelieu as little to his taste as that of Maurice, he accepted the invitation of the Swedish minister, Oxenstierna, and took up his residence at the Swedish Court. In 1634, he was appointed Swedish ambassador to France, remaining there until 1644, the year preceding his death.

Grotius is generally, and rightly, regarded as the father of modern international law, but he had many forerunners. It will be profitable, therefore, to examine the methods of international intercourse before his time and to consider briefly some of those who commented upon that intercourse. The international law of the most remote antiquity may be defined simply as a system of ceremonial observances in time of peace, which, when war arose, was replaced by unrestricted barbarity. Numerous illustrations of this may be found in the Old Testament.¹ This barbarity to the enemy seems to have been common to all the nations of antiquity.

The relations of the Greek city-states have not been without influence in the formation of international law, for they afforded a classical parallel of a system which actually worked, though not without flagrant violations, as a perusal of the pages of Thucydides will show. For mutual preservation the several states banded together in associations which varied in character from a loose alliance to a federation, one of which at least, the Achaian League, ultimately resulted in the domination of one member over the rest. But the mutual suspicion existing among the Greek States generally favoured a principle approximating to the modern European theory of a balance of power. In spite of the fact that a Greek State more often made war upon another Greek State than upon an altogether foreign foe, their warfare was somewhat barbarous in spirit, and the usual penalty which an unsuccessful state paid to the conqueror was the enslavement of a portion, at least, of its inhabitants. However, τὰ νόμιμα τῶν Ἑλλήνων ("the Customs of the Hellenes") prescribed certain regulations, such as the inviolability of heralds and ambassadors, and the recognition of the right of truce for burial of the dead, the inviolability of temples, the right of asylum, the sacred nature

¹ Cf. 1 Samuel xv. 18-9, and 2 Samuel xii. 31.

of hospitality, and the sacredness of treaties. Further, the Greeks admitted the possibility of arbitration as a means of averting war. Maritime customs were developed in the island of Rhodes about the third century B.C., and traces of the Rhodian Law survived into the Middle Ages, when they were incorporated into the *Consolato de la Mare*.

Roman customs in matters of war and international relations somewhat resembled those of the Greeks. In the early days of the Republic, a confederacy of Latin States existed, out of which the Empire of Rome was shortly to develop, like the Athenian Empire from the Achaian League. The Romans, like the Greeks, acknowledged certain ceremonial requirements for the declaration or termination of war. This was known as the *jus fetiale*, an obscure science known only to the members of the priestly College of Fetiales.

It was not this branch of law, however, which was destined to have such an important influence upon the modern law of nations, but the *jus gentium*, which the Romans understood to be a kind of international private law, and which was administered by the *prætor peregrinus* to the aliens residing in Rome. Roman jurists sought to establish some connection between the *jus gentium* and the more ethical conception of the *jus naturale*. This, too, has influenced the development of the public law of Europe.

We pass now to the precursors of Grotius. The *jus gentium* passed into the Civil Law, and so, more remotely, into the Canon Law. During the Middle Ages the Canonists, on the whole, were more active than the civilians in the consideration of topics of an international nature. The early Fathers were concerned about the lawfulness of a soldier's occupation. Tertullian was inclined to think it was unlawful; Augustine, on the other hand, took a broader view. Isidore of Seville deals with international matters under various heads, such as "*jus gentium*," "*jus militare*," and "*de bellis*." The Decretum Gratiani considers these and similar topics in the twenty-third *causa* of the second part under the title *De re militare et de bello*. This forms the basis of treatment for pre-Renaissance writers. In 1360, Giovanni da Legnano, Professor of Civil and Canon Law at Bologna, wrote a treatise, *De bello de represaliis et de duello* (published for the first time in 1477). Holland describes it as "highly characteristic of the age," and remarks: "He relies almost entirely upon the Bible and the civil and canon laws, but in his definition of virtue avowedly follows Aristotle. He makes little use of historical illustration, though mentioning the case of Conradin."¹ Among

¹ *Studies in International Law*, p. 45.

Giovanni's followers were Honore Bonet, a Benedictine monk who wrote a treatise, *L'arbre de batailles*, about the year 1385. It contained one hundred and thirty-two chapters dealing with the laws of war. This was copied by Christine de Pizan, a remarkable woman born at Venice in 1363, among whose works was a *Livre des faits d'armes et de chevalerie*. Other writers dealing with the question of war were Henry of Gorcum, Professor of Divinity in the University of Cologne during the middle period of the fifteenth century; Martin Gariatus, Professor of Law at Siena and Pavia; and Constanzo Landi. Much more important than these, however, was Pierine Belli (1502-1575), whose work, *De re militare et de bello*, was written about 1558 and was published in 1563. This is a comprehensive treatise, and a marked advance upon the work of previous writers, but Holland, after considerable examination of it, has said: "Belli lived just too early to think of placing his science upon another foundation than that of the Church, nor had he such grasp of his subject as would have enabled him to abstract it from topics with which it has no further connection than that they, like it, are brought under the notice of a President of Courts-martial."¹

The school of casuists in Spain, faced with the problem of the treatment of the aborigines of the New World, and similar questions, produced a series of writers upon international topics. Among these were, Johannes Lupus (d. 1496), a canon of Segovia; Alphonse Alvarez, President of the Royal Chamber of Naples; Francisco Arias; Franciscus Victoria (1480-1546); Dominicus Soto (1494-1560), a pupil of Victoria; Sepulveda; Vasquez (1509-1566); Covarruvius, whose great treatise, *Tractat de Legibus ac Deo Legislatore*, was published in 1613. All these writers were theologians as well as jurists, and their works were primarily written in defence of Spanish policy; but this led them to discuss wider questions of war and state-rights generally, and it is this feature which gives them a certain permanent value.

Three Protestant jurists, whose speculations upon the *jus naturale* led them to consider international questions, are Hemming, Winkler, and Oldendorp. The latter particularly is interesting, for, in common with the other members of his school he identifies the Law of Nature with the Law of God as revealed in the Bible, and more especially in the Decalogue. But he goes beyond them in holding that the excellence of the Roman system is due to the fact that it was based upon the XII. Tables, which are Greek in origin; and the Greeks received the principles enshrined in them from the Hebrews, whose law was given to them directly from God. Incidentally, this emphasises the distance yet to be travelled

¹ *Op. cit.* p. 50.

before modern juristic notions could reign supreme in international law.

More important than any of the jurists we have so far mentioned is Balthazar Ayala (1548-1584). He differed from the other Spanish writers in that he was not a theologian as well, being a military judge in the army of the Duke of Parma in the Netherlands. His book, *De jure et officis bellicis et disciplina militare libra tres* (1582), contains much matter, particularly with regard to military discipline and tactics, which does not properly belong to the sphere of international law at all. But, at any rate, the spirit of the work is remote from the Middle Ages, for he plainly recognises that sovereignty is absolute and must be exercised over defined territory; and he argues that war may be just or unjust, according to its possession or lack of the full legal requirements, and ought to be waged in accordance with definite rules. Ayala is important in another respect—he belongs to the “natural” school of writers on international law.

With Albericus Gentilis (1552-1608) international law is assuming a very modern shape, for he omits all such topics as tactics and military discipline, which Ayala included, and confines himself to the content of the subject, and its theoretical foundation. Gentilis was an Italian Protestant, educated at the University of Perugia under Rinaldo Radolfini. In consequence of his religious opinions, it became necessary to leave Italy, and he arrived in England in 1580. Seven years later he became Regius Professor of Civil Law at Oxford. In July 1588 he discoursed on the laws of war, the causes of making it, the mode of carrying it on, and the rights of conquerors and conquered. Subsequently disputations were held under his presidency upon similar topics. On these was based *De jure belli commentatio prima*, a work published in the same year. In 1598 the same work, tremendously enlarged and now entitled *De juri belli libra tres*, appeared. Westlake, in a review of Holland’s edition of Gentilis’ work, republished in his *Collected Papers*, amusingly summarises the first chapter, containing the argument of the whole work:

“The proper foundation to build on is natural reason, the consent of all nations (the terms are treated as controvertible). All nations? Well, no; that is the way Donellus presses definitions, but do not let him mislead you, for the consequence is that he has to give the definitions up. And the Roman lawyers did know nearly all the world, and the unknown must be judged by the known. Besides, if all do not agree, the major part must govern, just as with individuals in a state (remember that Gentilis came from an Italian city). And then, too, natural reason is plain in itself. It is enough to say, ‘Nature teaches us,’ for you

know there are things that are only made darker by trying to prove them. We shall quote great authors, as in other arts and sciences, and the doings of great and good men, and Roman law, and the Bible. Go to the mathematicians for proofs : the nature of my subject only admits of persuasion. ‘Come, then ; there is no lack of matter to ground our decisions upon, so let us begin.’”¹

Gentilis, therefore, was a pronounced naturalist, thus following the tradition of Oldendorp and the other Protestant writers. He treats the subject with considerable power and with extreme fulness, and his work forms the basis of the first and third books of Grotius’ greater one ; but the treatment of Gentilis is much lower in tone than that of Grotius. It is more favourable to expediency, at the expense of principle. Nevertheless, it is a noteworthy achievement, and the treatise of Gentilis was necessary before that of Grotius could be written.

It now remains to consider *De juri belli ac pacis* itself. Grotius was a naturalist, but he went back to the classical jurists rather than to the mediæval canonists for his conception of the Law of Nature. He defines this as follows : “Natural law is the Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it a moral turpitude or a moral necessity ; and consequently that such act is forbidden or commanded by God, the author of nature. . . .

“That there is such a thing as Natural Law, is commonly proved both *a priori* and *a posteriori* : the former the more subtle, the latter the more popular proof. It is proved *a priori* by showing the agreement or disagreement of anything with the rational and social nature of man. It is proved *a posteriori* when by certain or very probable accounts we find anything accepted as Natural Law among all nations, or at least the more civilised. For a universal effect requires a universal cause : now such a universal belief can hardly have any cause, except the common sense of mankind.”²

In the same chapter we find an interesting view of the universe which makes Natural Law independent of the Divine power, and even intimates that God is inferior to the law. “Natural Law is so immutable that it cannot be changed by God Himself. For though the power of God be immense, there are some things to which it does not extend : because if we speak of those things being done, the words are mere words, and have no meaning, being self-contradictory. Thus, God Himself cannot make twice two not be four ; and in like manner, He cannot make that which is intrinsically bad not be bad. For as the essence of things,

¹ P. 34.

² See book i. chaps. i., x., and xii. (Whewell’s translation).

when they exist, and by which they exist, does not depend on anything else, so it is with the properties which follow that essence, and such a property is the baseness of certain actions, when compared with the nature of rational beings. And God allows Himself to be judged of by this rule." This was necessary to Grotius' theory, and in addition it helped to re-establish the law in that place from which international relations modelled on Machiavellian principles had torn it. At the same time, he is in opposition to that school, which was to include Hobbes, and which based law upon utility or expediency. It is not merely convenient for man to live in society obeying laws, says Grotius, it is his nature to do so. Here we seem to trace echoes of Aristotle and the later classical philosophers. Again, Natural Law is divided into two kinds—pure or properly so called, and that which is peculiar to certain circumstances. This distinction enables Grotius to justify private property, according to the second class, without controverting the continuous string of jurists and philosophers who held that it was not an institution of Natural Law—for he admitted that it was not—according to *pure* Natural Law.

Grotius also attempted to distinguish between Natural Law and *jus gentium*. This in Roman times had been a system of private law, but during the Middle Ages the term had become restricted to those usages governing the relations of civilised groups, and particularly the law of war. Grotius retains the public use of the word, but follows Gentilis in extending it to include all the relations of states with one another. The basis of the *jus gentium* is the consent of all, or at least very many nations, and is proved by common practice. This distinction of Grotius, laboured though it may seem, and almost impossible even for Grotius to preserve throughout his treatise, serves an exceedingly useful purpose; for, according to Grotius' theory, an infringement of the *jus gentium*, which merely consists of non-observance of a custom, is not a just cause for war, while breach of the *jus naturale* is.

We have already noticed that with Grotius, Natural Law was independent of, if not superior to, the existence of God. Grotius recognised, however, that Divine ordinances, even if they were neither strict natural law nor positive State-law, ought to have some influence upon human affairs. Accordingly, in his somewhat complicated classification of law, he finds a place for a principle derived from Divine law, which bears many different names (e.g. *proximi caritas* or *æquitas et benitas*) but is always exercised towards the elevation of human institutions. This leads him to examine international custom as it existed in his day, and particularly the usages of warfare, and he finds that although these are

undoubtedly *jus gentium*, being founded on general usage, yet it would be well if they were modified in accordance with the higher principle. This was the constructive part of his work. "The great labour of Grotius," says Westlake, "was to establish, by the side of each licence which (the customary law of war) granted, some correction (*temperamentum*) which might reduce it to the measure of the natural law as modified by the principle of love to one's neighbour."¹

Sooner or later, the student of Jurisprudence always returns to Roman law, and the study of the origins of modern international law is no exception to the rule. "Setting aside the Conventional or Treaty Law of Nations," says Sir Henry Maine, "it is surprising how large a part of the system is made up of pure Roman law."² Westlake, endorsing the view, points out that even if Grotius did not do so himself, his successors made complete the analogy between the private citizen in Roman law and the State, as represented by the sovereign in international law, "and thus, among other parts, the Roman law of property passed over almost bodily into the international law of territory."³

When Grotius died in 1645, the Thirty Years' War was nearing its close. Three years later, the Treaties of Munster and Osnabruck, usually known as the Peace of Westphalia, set the seal to his work. The 'Thirty Years' War, from being a struggle for power among the German princes and a repudiation of the overlordship of the Emperor, had gradually involved all the European powers in succession. As a result, every European nation except England, Poland, Turkey, and Russia was represented at the Peace Conference. The first result of it was the recognition of a society of independent nations, occupying defined territory, and equal before the law. In this it will be seen that the principles of Luther, Bodin, Machiavelli, Grotius, and all the other Renaissance writers obtained full confirmation. The independence of states was acknowledged by their right to appear at congresses, and to make war and peace upon their own initiative, without any reference either to the Emperor or the Pope. Thus, in one sense, the Peace of Westphalia may be taken as the political close of the Middle Ages. Intellectually, this period had closed with Columbus and Luther. Regarding the Peace in another way, we may say that it recognised the territorial state as the unit of international society. Both monarchical and republican states were represented, and also Protestant and Christian. Subsequently Turkey and other non-European powers were admitted into the society of nations. Obviously, therefore, the exercise of sovereignty over defined territory became the test of an inde-

¹ *Collected Papers*, p. 46.

² *Ancient Law*, p. 100.

³ *Op. cit.* p. 48.

pendent state, and general conformity with civilised customs, especially in waging war, became the criterion governing the admittance or exclusion of a state from the society. This society was recognised in several ways. In the first place, general congresses of states, commencing with that of Westphalia, and further exemplified in those of Vienna (1815), Berlin (1878), Versailles (1918), and Washington (1922), became a feature of international relations; secondly, ambassadors and ministers of a state were regularly sent, to reside permanently at the courts of other states. Although such ministers and ambassadors had been sent before 1648, the system did not become finally fixed until that date. Lastly, the society was considered to be organised in accordance with the principles of international law. A necessary consequence of independence was the equality of states before the law—a fundamental principle, and at the same time a rule of practice, of international law. In this way only could small states be assured of continued liberty. This led to a maintenance of the principle of the balance of power, unvaryingly antagonistic to any scheme of world-power.

The candidates for world-power during the Middle Ages had been the Pope and the Emperor; and during the sixteenth century, the Spanish monarchy. Each of these failed to make good his pretensions; the Peace of Westphalia recognised the accomplished fact. The Papacy was represented at the Congress, but the Pope was recognised as a European sovereign in virtue of his papal territories in Italy, not as a person claiming overlordship over Europe. This was indeed impossible, when half Europe, in adopting Protestantism, had directly repudiated his authority. The Empire, too, was recognised as a name, rather than a description of existing conditions, except in respect of the hereditary dominions of Austria, for the German and Italian princes and states were represented at the Congress, and their right to enter into diplomatic relations of all kinds with other states, both within and outside the Empire, was formally acknowledged. A qualification indeed, existed, that these should not be prejudicial to the welfare of the Empire, but this was an exceedingly elastic provision, which, with a little dexterity, could be twisted to fit any case. At any rate, the other European states treated them as absolutely free. Finally, the independence of Holland and Switzerland was recognised. This was a limitation to the pretensions at once of the Empire and the Spanish monarchy, but in both cases the accomplished fact had long ago deprived the recognition of any practical importance.

International law includes that body of rules which regulates the action of civilised states in their dealings with one another.

It therefore defines the essentials of state personality, the conditions under which states come into existence or cease to exist, their rights and duties in time of peace, their rights and duties as belligerents, and finally, their rights and duties during the existence of a war to which they are not parties. It will naturally be asked, From what source do these rules proceed? Unfortunately there have existed since the time of Grotius several schools of thought, proffering different answers to this question. Of these schools, the Naturalists were at first the most important, for they had the whole range of classical and mediæval tradition behind them; and the European respect for written authority, more especially that enshrined in the classical writers, died hard. As a result, the writings of the German philosopher, Pufendorf (1632-1694), upon international law, enjoyed a vogue comparable only with those of Grotius himself. In 1661 the first Chair devoted to the study of the Law of Nature and of Nations, at Heidelberg was founded and occupied by him, and his great work *De jure naturæ et gentium*, was published in 1672, while he held the Chair of Jurisprudence at the Swedish University of Lund. An abridgment entitled *De officio hominis et civis* was subsequently published.

In his philosophy, Pufendorf attempted to combine the views of Grotius and Hobbes (1588-1679), and to add something of his own as well. In regard to Natural Law, he takes up the position of Hobbes completely. He defines Natural Law at the beginning of Book II., Chapter III. as "that most general and universal rule of human action, to which every man is obliged to conform, as he is a reasonable creature," and later in the same chapter he writes: "There is still one question behind which requires our determination, whether or no there be any such thing as a particular and positive Law of Nations, contradistinct to the Law of Nature. Learned men are not come to any good agreement on this point. Many assert the Law of Nature and the Law of Nations to be the very same thing, differing no otherwise than in external denomination. Thus, Hobbes divides Natural Law into Natural Law of Men and the Natural Law of Nations. He observes that—'the precepts of both are the same; but forasmuch as States when they are once instituted assume the personal properties of men, hence it comes to pass that what, speaking of the duty of particular men, we call the Law of Nature, the same term the Law of Nations, when we apply it to whole States, Nations, or Peoples.' This opinion we for our part readily subscribe to. Nor do we conceive that there is any other voluntary or Positive Law of Nations properly invested with a true and legal force and obliging as the ordinance of a superior

power." There are several interesting features in this paragraph. In the first place, we notice how completely Hobbes, and Pufendorf following him, has borrowed the idea of state-personality from Roman private law. And then we observe that Pufendorf's view of law is in conflict with an historical view of it, and is, in fact, thoroughly Austinian. This leads him to deny the existence of international law altogether apart from Natural Law.

Hobbes had maintained that the guiding principle of human action in relation to the external world had been self-interest, leading to the establishment of institutions, from a motive of fear, to promote individual security. Pufendorf inclines to the theory, but does not altogether adopt it. Hobbes' theory led to the view of "a state of nature" as a miserable condition, leading men almost in despair to elaborate institutions. Pufendorf takes a loftier view of the situation, and points out that since men are rational beings, they will be guided by Natural Law, or the dictates of reason, before they possess any institutions at all. This is obviously an anticipation of the "noble savage" of Rousseau. The primary dictate of Natural Law, therefore, is to preserve social life, by suitable institutions (so we see here an anticipation of Bentham's utilitarianism, leading to the promotion of the greatest possible happiness of the greatest number of individuals in any given society), and this leads Pufendorf to examine existing institutions in the light of his theory. In this examination, the influence of Grotius is evident, and in the main he reaches conclusions similar to those of his great predecessor, except over the question of a *jus gentium* apart from a *jus naturæ*, a point which we have already noticed.

Concerning the origin of Society, Pufendorf holds that it rests upon two contracts, the first or "social" contract between the individual members of the society for its formation and method of government, and the second between the governing body and the governed. In this way, sovereignty has been defined and delegated, and, like Grotius, Pufendorf believes that it may also be limited. Incidentally this limitation may be external, when it consists of ancient custom, and internal, when it is in pursuance of the Law of Nature or the Law of God. However, it must not be imagined that either Grotius or Pufendorf had a really clear idea of sovereignty, for both of them relate that the sovereignty of the monarch is not impaired by the existence of a Parliament which assists in legislation.

Christian Thomasius (1655-1728) may be regarded as a follower of Pufendorf. His most famous book, *Fundamenta juris naturæ et gentium ex sensu communi deducta*, was published in 1705. Its title is significant, for not only does it indicate an adoption

of Pufendorf's basis for the law of nations, it even explains its origin further in the phrase *ex sensu communi deducta*. Obviously, therefore, Pufendorf's definition of Natural Law will do for both writers. Thomasius distinguished between law and morality by limiting the sphere of the former to the enforcement of perfect duties, all of which may be embraced within the maxim, "Do not do to others what you do not wish them to do to you." All affirmative, or imperfect duties were, therefore, within the sphere of morals alone. Thomasius is also in accord with Grotius when he maintained that Natural Law is independent of Divine will, and further that the position of God as a law-giver is not *legislator despoticus*, but *pater, consilarius, doctor*.

The sphere of international law had been narrowed by Pufendorf under the influence of the conception of the Law of Nature, and had been limited still further under the same conception by Thomasius. It is not surprising, therefore, that a certain cleavage now manifested itself in the school of "naturalists." The limited tradition was continued by Barbeyrac (1674-1744), who translated into French and commented upon the works of Grotius and Pufendorf; Burlamaqui (1694-1748), a Genevan whose *Principes du droit naturel et politique* was published the year before his death; Thomas Rutherford, whose *Institutes of Natural Law* appeared in 1754; De Rayneval (1736-1812), who wrote a treatise, *Institutions de droit de la nature et de gens*; and by Professor Lorimer, whose *Institutes of the Law of Nations*, published in 1883, is the last expression of what we may term the "pure natural law" theory.

The other branch of the naturalistic school first makes its influence apparent in the works of Christian Wolff (1679-1754), whose writings, together with those of Pufendorf, were extraordinarily popular in Europe, and especially in Germany, though their importance cannot for a moment be compared with that of the treatise of Grotius. Wolff's great work, *Jus gentium methodo scientifica pertractatum, in que jus gentium naturale ab eo quod voluntarii pacitii et consuetudinarii est accurate distinguitur*, appeared in 1749 in nine large volumes; but this work was needlessly tedious and diffuse, and in 1754 the author published an abridgment entitled *Institutiones juris naturale et gentium, in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur*. Wolff's legal philosophy is almost meaningless without a consideration of his system of ethics, which is set forth in *Vernünfftige Gedanken von der Menschen Tun und Lassen, zur Beförderung ihre Glückseligkeit den Liebhabern der Wahrheit mitgeteilt*. At the beginning of this work, Wolff observes: "As nature makes it incumbent upon men to perfect themselves and their

condition, and to avoid whatever detracts from such perfection, there arises the precept, as a rule of nature, to do that which makes for the improvement of oneself and one's condition, and to avoid that which makes against it." Hall has admirably summarised Wolff's teaching as follows: "According to Wolff, man is bound by the law of his nature to attain the highest perfection of which he is capable, and the obligation to perform an act being regarded as giving rise to the rights necessary for its performance, he is endowed with innate rights of liberty, equality, and security, which are necessary to his development. These innate rights others are bound in their turn to respect; their acknowledgment may therefore be compelled, and their infringement punished. Subjectively also a man in the natural state is bound to assist his neighbour in arriving at the perfection which is the end of his being; but the obligation implies no correlative right to demand its fulfilment, and compliance with it cannot, therefore, be enforced. Thus the Natural Law of Wolff distinguishes, like that of Thomasius, between law and morals, but it again enlarges the compass of the former by expressly importing into it the principle of right to liberty of action. In their results, the one seems to lead to such laws as those which exist in actual human societies, and the other provides free scope for a vague ideal."¹

Wolff's theory, when applied to international law, led him to establish a number of rights, inherent in states as in individuals, and to make these rights the standard of justice in any particular case. But Westlake truly points out that such inherent rights may very easily conflict. What is needed, therefore, is some method of adjustment, and this may only be discovered, if it is to be of any practical utility, in the actual relations of states. Furthermore, the right may be admitted in full, and yet it may still require regulation in its application in any given instance.

Wolff, therefore, followed Thomasius, Pufendorf, and Grotius with considerable modifications, which were probably due to the influence of the German philosopher Leibnitz (1646-1716), whose legal speculations were based upon Roman jurisprudence, modified by ethical conceptions borrowed from the Greeks. Vattel (1714-1767) was a native of Neuchatel, and served for some time as *conseiller d'ambassade* and *conseiller privé du cabinet* to the elector Augustus III. of Saxony. Vattel's great work, *Le Droit des Gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, appeared in 1758. In the preface he states that he had at first intended to translate Wolff's work and to turn it into more agreeable form; but during the process he had found it necessary to alter his plan, and to write his own

¹ *A Treatise on International Law*, W. E. Hall, 8th edn. p. 3.

treatise, "selecting from the work of M. Wolfius the best parts, especially the definitions and general principles." This is a fair estimate of his debt to Wolff, for the latter was essentially a theorist. Vattel, on the other hand, wrote with a more practical end in view, being closely connected with the diplomacy of the day. Accordingly, therefore, although the subsoil is still Natural Law, this is overlaid with a considerable amount of custom, and Vattel's treatise "presents the law of nations as it then stood with a fulness of which there had been no previous example, including the topics which had grown up since the time of Grotius or on which Grotius had not dwelt, and on which Wolff had had little or nothing to say."¹

Greatly apart from Vattel, and yet influenced by Thomasius, Leibnitz, and Wolff, is Kant (1724-1804). The connection between his celebrated "categorical imperative," which reads, "Act so that your rule of conduct permits you to desire that it may become a universal law," and the negative maxim of Thomasius, is obvious. This categorical imperative belongs strictly to the realm of ethics, but it influences Kant's conception of law very considerably, for he defines it as "the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive view of freedom," from which he again derives a general principle of justice: "So conduct your affairs that the free use of your will is compatible under a general law with the freedom of every one else." Thus the central part of Kant's philosophy is liberty, proceeding from the dictates of reason, and the function of law is to secure the greatest exercise of the privilege of individual freedom that will not interfere with the freedom of all the other members of the community. Now, as between states, there exists no such law restraining individual freedom, and the only argument of a state is therefore force. But this state of affairs is itself at variance with the principle of reason, and menaces the individual liberties founded upon it. The function of states, therefore, is to imitate men, who have by contract constituted a state, with a restraining force to secure liberty. Kant's foundation for international law would therefore be observance by states, based upon the consent of those states to observe it.

Kant's influence both upon his own and later generations was extremely great, but it would be beyond the scope of this chapter to trace that influence in the works of Fichte (1762-1814), Schopenhauer (1788-1860), and their successors, for it involves a journey too far afield. It is now necessary to say something of the works of that school of international lawyers which in contradistinction

¹ Westlake, *Collected Papers*, p. 76.

to the "natural" has been named the "positive" school. As a rule, until modern times, the leaders of this school were not so eminent as the leaders of the "natural" school—possibly because they often confined themselves to the discussion of a single topic of international law; but nevertheless, they could appeal to practice, whilst the "naturalists" were compelled to have recourse to "natural law" and "right reason"—a procedure which occasionally placed them in logical difficulties when their theory indicated a course which was obviously not in accordance with practice. It is in the positive school of international lawyers that English writers for the first time assume any importance. The first of these is John Selden (1584–1654), whose *Mare Clausum*, published in 1635, was written in denial of Grotius' views, set forth in *Mare Liberum*. Another of Selden's works was *De jure naturale et gentium juxta disciplinam hebreorum* (1640), which also recognises the importance of a positive Law of Nations. Following him were Richard Zouche (1590–1660), Regius Professor of Civil Law at Oxford, and later Judge of the Admiralty Court, who wrote a manual of international law which had a considerable influence; and Sir Leoline Jenkins, who followed Zouche in the Admiralty Court, and who was the first great English authority upon the law of prize.

Continental writers were slower to accept the principles of the positive school. One or two German writers during the seventeenth century have inclinations that way, and chief of these was Rachel; but the title of his book, *De jure naturæ et gentium* (1676), which is identical with that of Pufendorf, published four years earlier, indicates to what extent the theory of Natural Law ruled the Continent at that date. Incomparably the most important positive jurist of the period on the Continent was Cornelius van Bynkershoek. Bynkershoek was president of the high council of the United Netherlands, and although he never wrote a comprehensive treatise upon international law, his three works, *De dominio maris* (1702), *De foro legatorum* (1721), and *Questionum juris publici libri duo* (1737), are extremely important in the history of international law. With Bynkershoek, principles dictated by reason are still important, but he observes that the counsels of reason are often uncertain, and that we ought to look habitually to treaties and other international acts and documents in order to establish custom as an important source of law. "I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another, and in examples that have occurred in one country or another, rather than from the testimony of any poet or orator, Greek or Roman"—a very palpable hit at the erudite Grotius

himself. Speaking of contraband, he again says "the common law of nations on this matter can only be learnt from reason and custom."¹ Wheaton calls Bynkershoek "the first writer who has entered into a critical and systematic exposition of the Law of Nations on the subject of maritime commerce between neutral and belligerent nations,"² and it is this characteristic which especially links him up with the English writers of the time.

More completely positivist than Bynkershoek was J. J. Moser (1701-1785), who published a great number of works, totalling several hundreds in all, and most of them dealing more or less with the growth and scope of international law. Throughout, Moser practically ignores the Law of Nature.

We are now rapidly approaching the modern period, and except in England, where nearly all writers as a rule have confined themselves to a positive view of international law, based upon the history of international relations, more modern writers, while paying great attention to custom, still admit, but to a limited degree, the influence of reason as a rule of nature. Taking a few important names at random, G. F. de Martens (1756-1821), whose great work, *Précis du droit des gens moderne de l'Europe* (1788), has been translated into most European languages, and has exercised a very great influence upon opinion, Henry Wheaton (1785-1848), and Bonfilis, we find that the natural tradition is not yet completely extinct. A list of English writers on international law would be too long, and would mean very little, but among the most important are Sir Robert Phillimore (1810-1885), for some time Judge of the Admiralty Court; W. E. Hall (1835-1894), whose *Treatise on International Law*, published in 1880, shows extreme grasp of principle, and will long remain a standard text-book; T. E. Holland; John Westlake (1828-1913); and L. Oppenheim, a German jurist who occupied the Whewell Chair of International Law at Cambridge from 1913 until his death in 1917. Sir Henry Maine also contributed to the science, and no list, however brief, would be complete without the inclusion of William Scott, Lord Stowell (1745-1836), who, though he never wrote a treatise, by his judgments on questions of international law, given between 1798 and 1828, performed incalculable services to the science.

Since the early days of international law there has been a change in the position of writers. At first it was the function of Grotius, Pufendorf, Bynkershoek, and their successors to indicate what the law ought to be, and by appealing to the principle of reason and the Law of Nature they first sketched out the boundaries

¹ See Westlake, *Collected Papers*, p. 68.

² Wheaton, *History of the Law of Nations in Europe*, p. 193.

of the subject, and later filled in the details. Thus their function was primarily one of creating opinion leading to the adoption, modification, or abolition of some custom. In those days it was necessary for the jurist to precede the diplomatist. Now, however, the position is reversed. The diplomatist must come first, and establish the custom ; then the jurist comments upon it. So long as any practice exists the jurist must deal with it as existing. Only in the absence of custom is he at liberty to consider if one would be beneficial to the society of nations. Now, too, a strong international opinion also exists, where it was formerly absent. So long as a jurist interprets that opinion correctly, his writings will have weight. Where he exceeds these limits, his writings will have weight only in so far as his reputation will support them. Besides, the process of codifying international law is proceeding rapidly. The jurist, therefore, has no other course but to comment upon that code, so far as it exists, and upon the customs which supplement it. To comment upon what the law ought to be does not belong to the sphere of international law at all, but to a separate branch of knowledge—"The Purposes of Legislation."

The literature of international law has been considered with some fulness since the science itself owes its existence to the jurists. Surveying that literature as a whole, however, the question arises, is this science really a branch of law at all? Austin, who regarded law as exclusively imperative in form, unhesitatingly declared it to be, not Law, but Positive Morality. This view, however, is not accepted by modern jurists, more especially those who accept Sir Henry Maine's objections to the conception of law as a command. It is pointed out that the term Law includes both perfect and imperfect law, and that whilst municipal law is an example of the former, early law and custom and international law are examples of the latter. International law, indeed, bears numerous resemblances to early law, in which rules based on usage were followed, and self-help was the only remedy available to the injured party. This seems by far the most convincing argument, though others are frequently advanced. Thus, it is pointed out that states and jurists consistently refer to it as law, and that states in their conduct gave evidence that they regard it as binding ; but states, for expediency, may deem it convenient to regard other rules (*e.g.* those of international morality) as binding, and for a similar reason they may disregard international law ; whilst jurists for over two thousand years have spoken of a "Law of Nature," although this is less truly law than international law. Again, it is advanced that international disputes are conducted in a legal fashion, that precedents

and usage are cited, and conduct determined in accordance with legal principles exclusively; but mediæval theologians were accustomed to develop their arguments in a similar legal manner, yet this did not transmute theology into Positive Law. Finally, it is urged that international morality exists apart from international law, and that breaches of it, though blameworthy, give rise to no cause of action. To this it may be replied that whether a state takes umbrage at a breach of international law or a breach of international morality, depends very largely upon political considerations.¹

It must further be observed that if Law is to be understood in its Austinian sense, the phrase international law is itself a contradiction of terms, since it cannot be law until a super-state authority exists to enforce it, and when such an authority does exist, the law will have ceased to be international. Even regarding it as imperfect, under the wider definition of law, we must recognise the cardinal limitation of the science. If it ever becomes as perfect in form as municipal law now is, it will have become the municipal law of a world state. At the same time, this does not prevent attempts to provide international law with a more regular sanction than the only one which has until recently existed, namely, the sanction of war, which though it has been termed the litigation of states, really corresponds with that procedure by self-help which prevailed before any regular system of litigation existed.

In the past half-century, therefore, a constant desire has been manifest among civilised states to discover some method whereby disputes might be settled without recourse to war. The earliest method to find approval was arbitration, and numerous treaties, beginning with the Treaty of Washington in 1870 between the United States and Great Britain, bound the parties to submit certain classes of disputes to arbitrators. To facilitate this procedure, a Permanent Court of Arbitration was established as a result of the First Hague Peace Conference in 1899. This consisted simply of a panel of international jurists from whom arbitrators might be selected. A project to establish a Court of Arbitration in the true sense, advanced at the Second Hague Peace Conference in 1907, was unsuccessful.

A great step forward was taken towards the better enforcement of international law at the conclusion of the War of 1914-1918. In 1919, the League of Nations came into existence, and its members now include practically all the civilised states of the world except the United States and Russia. The activities of the League are conducted through the Assembly, the Council, and

¹ There is also an international comity which includes those rules of courtesy which states extend to one another without being legally compelled to do so.

the Permanent Secretariat. Representatives of every member meet periodically in the Assembly, with competence to deal with any matter within the League's sphere of activity or affecting the peace of the world. All members pledge themselves on joining, in the Covenant, not to resort to war until the dispute has been considered by the League, and pacific methods of settlement have failed; and they also undertake to respect and protect the territorial integrity and independence of members. If a member of the League resorts to war in disregard of its undertakings, it is deemed to be *ipso facto* at war with all other members of the League, who must thereupon terminate all economic intercourse with the offending state.

In 1921, a further achievement in promotion of more regular legal methods of settling international disputes was recorded, in consequence of the adoption by members of the League of the Protocol for a Permanent Court of International Justice. This Court, comprising eleven judges and four deputy judges, has its seat at the Hague, and has jurisdiction in certain classes of disputes between members of the League, who may declare that they recognise as compulsory the Court's jurisdiction in disputes concerning the interpretation of a treaty, or any question of international law, or with regard to the existence of any fact which, if established, would constitute the breach of an international obligation. Not all members have accepted this clause, however, although Great Britain and the Dominions have recently done so. Other disputes may be referred to the Court by mutual consent of the parties.

It will, therefore, be seen that much has been accomplished since 1918 towards a substitution of accepted methods of litigation for war as the normal method for settling disputes between states. Since all these international organs are as yet in their infancy, it would seem that their success in the future depends upon the extent to which the habit of law-abiding conduct replaces dependence upon war as the final arbiter in the intercourse of civilised states. While this change actually occurred in municipal law, it must not be forgotten that the process of development may well differ in the sphere of international law, in consequence of the determination of states to preserve their independence and legal authority as regards one another. In other words, it seems probable that international law will always rest upon consent rather than upon a single superior authority, wielding organised force.

It remains only to notice the sources of international law. These have been recently defined as follows:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states.

Treaty law has always been an important source of international law, forming, as it were, a particular Law of Nations between individual states, and when the rules therein established attained sufficient generality, they were accepted as part of the general law. The nineteenth century, however, witnessed increasingly frequent efforts to lay down international rules in general conferences, and this practice is becoming still more important in the present century.

2. International custom, as evidence of a general practice accepted as law.

Custom, as was pointed out earlier in the chapter, has been until very recently the most important source of law of the positivist school of international lawyers, and in practice, states in their disputes invariably base their arguments upon custom, if this exists.

3. The general principles of law recognised by civilised nations.

This is obviously designed to meet cases where no clear custom exists. It probably also opens the door to principles of Natural Law, in the absence of an existing rule of positive international law.

4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations.

The decisions of the Permanent Court, and of other international courts when they are established, are destined to play a most important part in the definition and development of the international law of the future, whilst the part played by text-book writers in the past has been sufficiently indicated already.

The Permanent Court is empowered, however, to decide a case, if the parties desire it, *ex aequo et bono*, in preference to adhering to the rules of strict law. The existence of this provision may perhaps in time give rise to a system of international Equity, thereby preserving international law from the reproach of becoming out of harmony with international public opinion.

42.—THE CONFLICT OF LAWS

HITHERTO in this volume, law has been considered as a body of rules applicable to persons generally within a given community. Since comparisons have frequently been made, however, between rules of law applicable in various communities, it is clear that there does not yet exist a single body of legal principles, universally applicable to all human beings ; and since each state possesses its own system of law, it is obvious that questions concerning the extent to which any particular legal system applies will frequently arise. Thus, if Titius and Gaius, both Roman citizens, make a contract in Rome, to be carried out in Rome, there can be no question that Roman law governs the entire transaction. But if Titius is in Rome and Gaius is in Greece, or if Titius is a Roman citizen and Gaius is a foreigner, it may be that another system of law will govern the legal relation, or some part of it. In modern law, other questions of a similar nature may arise. A is a French citizen, his wife B, before marriage, was Dutch, and a son is born to them on a Spanish steamship in an Italian port. Do any rules exist to determine the nationality of the son ? Again, A, an Italian, murders B, an Austrian, in a German café. Have the courts of Italy, Austria, or Germany, or all of them jurisdiction in such a matter ?

There exists for the determination of these and other problems a body of rules, forming a branch of legal science, but there is no unanimity among legal writers with respect to the name of the topic. One of the earliest names given to it was Statutes, because questions of this type were first discussed in Italy, where difficulties arose with regard to the application of the laws of the various municipalities. In the phraseology of the old writers, a statute signified any legal rule not arising from Roman law, and might, therefore, be derived from custom, legislation, royal ordinance, or judicial decision.¹ Treatises upon Statutes have, therefore, been published from the time of Bartolus down to the end of the nineteenth century ; but, in addition to the awkwardness of using in general sense a word which in modern Jurisprudence bears a specialised meaning, the term has become associated with a

¹ Harrison, *Jurisprudence and the Conflict of Laws*, p. 111. Story, *Conflict of Laws*, chap. i.

particular method of solving problems relating to the application of law, of which more will be said shortly.

Perhaps the commonest title for the topic until recently was Private International Law, a title which has been adopted by several English writers and a number of continental jurists of the first rank. This term, however, is open to serious objection. The term international law was coined to denote that body of rules which states recognise as binding in their dealings with one another; but the subject now under consideration has nothing to do with this. It comprises the rules for determining when, and under what conditions, the laws of one state are applicable in the courts of another, whilst, as Professor Holland rightly points out, Private International Law ought logically to denote "a private species of the body of rules which prevails between one nation and another."¹

International Private Law is a term sometimes employed, but this is also indefensible. Private Law is contrasted with Public Law, and the distinction between them has already been noticed; but the present topic includes many questions relating to criminal law, *e.g.* extradition and the trial and punishment of persons accused of a crime committed beyond the borders of the state in which the trial occurs. Again, the subject comprehends matters relating to allegiance, naturalisation, and repatriation. These are also questions of Public Law. It seems better, therefore, to adopt some other term, if a better one is discoverable.

Mr. Frederick Harrison proposed the term Intermunicipal Law, urging that the subject really deals with the Interchange of Municipal Law, and that it thus forms a natural contrast with international law. He therefore regards it as "that part of Municipal Law which is determined by reference to more than one municipal system, that part of every municipal code which defines its relations to other municipal codes."² To this term Professor Holland objects that Municipal "in accordance with established use, is either equivalent to national, or relates to civil organisation."³

This criticism is hardly so fundamental as those which affect other suggested names, and it should not be forgotten that even the term international law is not perfect, since it relates not to nations, but to states. Mr. Harrison's suggestion, however, has not met with general acceptance.

Another designation sometimes used is that of Extraterritorial Effects of Law. To this there are two objections. In the first

¹ *Jurisprudence*, p. 422.

² *Jurisprudence and the Conflict of Laws*, p. 131.

³ *Op. cit.* p. 423.

place, the term seems to indicate that, under certain conditions, the laws of one state will prevail over the native system in the territory of another, whilst what actually occurs is that the native system itself includes rules which *permit* the application of foreign laws to certain situations. Secondly, the term Extraterritoriality is already employed to denote the system which prevails in certain countries of non-European civilisation, in virtue of which subjects of Western States remain subject to their own laws, administered in their own tribunals.

The term "Application of law" is too wide,¹ and Comity suggests those rules of courtesy existing among nations, but not amounting to rules of international law. There remains the title Conflict of Laws, which seems to be superseding that of Private International Law in generality. It has many times been pointed out that this is as serious a misnomer as any, since there is never any conflict, or collision, between two sets of legal rules competing for application by a tribunal to a particular dispute. In actual fact, the rules of law of one state indicate the selection of foreign laws for application to the case considered. The term is, therefore, unsatisfactory, but it has recently met with the most favour.

Although the science relating to the Conflict of Laws is relatively modern, the problem underlying it is almost as old as civilisation itself. Organised communities, even in primitive stages of development, possess laws which differ in some respects from those of all other organised communities. Climate, geographical situation, race, religion, and many other factors lead to divergences. Coincident with these differences is contempt for foreign customs. When the Europeans travelled to China in the sixteenth and seventeenth centuries, they were regarded as barbarians, and their laws as unworthy of consideration. It was the duty of their own headmen to preserve order amongst themselves, and if a Chinese life were lost as a result of foreign disorder, the life of a foreigner would be required in compensation. Beyond this, however, the Chinese officials were not interested in the foreigner. The laws of the Celestial Empire were too precious a possession to permit their application to the foreigner.² In precisely the same fashion were foreigners regarded in Ancient Egypt, Babylonia, and, at a later date, even in Greece and Rome.

As in China in recent times, however, the perception that the trade in which the foreigners were engaged was a benefit not to be lightly lost by the nation to which they resorted, led to the con-

¹ Holland, p. 422. The new Chinese Codes contain a collection of "Rules Relating to the Application of Foreign Laws."

² See further, Keeton, *The Development of Extraterritoriality in China*, chaps. i.-iii.

cession of certain privileges. Most important among these was the right to be governed by their own laws in matters affecting themselves only, and in some cases this was supplemented by the right to have their domestic disputes settled, either by one of themselves, or by a special official of the State in which they resided. Thus, in the second millennium B.C. Tyrians, and later, Greeks, were allowed to found establishments in Egypt, wherein they remained subject to their own laws. A similar system was applied to Phœnician merchants in Greece.¹

From the standpoint of Roman Civil Law, the foreigner was at first as rightless as he had formerly been in Greece, Babylon, and Egypt. In Rome again, however, the growth of commerce, and the resulting increase in the number of foreigners made it imperative that they should be subjected to some form of legal regulation. Accordingly, the office of *prætor peregrinus* was established, with power to settle disputes in which foreigners were involved. The rules he applied were borrowed in many cases from the legal systems of those foreigners over whom he had jurisdiction, and he sought, wherever possible, to apply the substance of the rule, ignoring technical details. It has often been remarked, however, that the Romans had no conception of the Conflict of Laws in the modern sense. They recognised no tribunals of equal authority with their own, nor any systems of law, each of which might, for certain classes of case, borrow rules from the other. The rules which they formulated for foreigners, though drawn from sources different from those of the civil law, were rules of Roman law, applicable to different classes of people. Subsequently, the civil law and the prætorian law became mingled. Again, under the Empire, conquered nations were allowed to retain their own customs to a considerable extent, but here again there is a similar absence of recognition of legal systems of co-ordinate authority. All of it derives its authority ultimately from administration in Roman tribunals, and from this alone.

It is clear, then, that we must look to some more modern systems of law than those of the ancient world for the origin of the science. On the break up of the Roman Empire, the barbarian conquerors were faced with the problem of ruling over subjects, some of them of Roman civilisation, and some possessing only the primitive manners and customs of the invaders. It was as impossible to govern the highly civilised conquered races by the primitive laws of the barbarian conquerors as it was impossible to govern the Teutonic conquering race by the precepts of Roman law. The rulers of the Goths, Burgundians, Franks, and Lombards, therefore, allowed each race among their subjects to retain

¹ *The Development of Extraterritoriality in China*, chap. xi.

their own laws and customs. Hence arose that personality of laws which is so characteristic of the Middle Ages. As Bishop Agobard put it, "it often happens that five men, each under a different law, would be found walking or sitting together."

At the same time, we have no indication of the methods by which disputes involving the application of more than one system of law were settled. Most probably the matter was left to private adjustment, except in the case of serious crimes which would undoubtedly be punished by the local municipal authority. A similar condition of affairs existed at Canton before treaty days. Here the merchants of most Western states congregated, and each national community settled its domestic disputes in accordance with its own laws. If a serious crime was committed by a foreigner against a Chinese, the Chinese authorities claimed jurisdiction, although the fellow-countrymen of the offender resisted this claim, if they considered themselves to be sufficiently powerful. If civil disputes arose between foreigners of different nationalities, or between foreigners and Chinese, they were settled by informal negotiation. There was no recognised legal procedure in mixed civil cases until the nineteenth century treaties.¹ Some arrangements of this type must necessarily have existed in the Middle Ages.

In the later Middle Ages, the position was further complicated by the conflict of two principles in relation to law. Underneath the personal laws of the subject-races of the Teutonic rulers was always the tradition of the universal application of Roman law to Western Europe. This tradition never completely died out, and indeed, in most parts of the Continent, the civil law, modified to some extent by local custom, eventually became the basis of the legal systems of those nation-states which the Renaissance and the Reformation created. In the Middle Ages, however, the basic law of the country—the territorial law—was merely one of several competing systems. In consequence, there arose the problem, When did the personal law apply and when the territorial?

The first jurist to attempt any scientific solution to this problem was Bartolus (1313–1358), one of the greatest Italian jurists of the Middle Ages. To him is due the distinction between *personal* statutes, which relate principally to the person, and which follow an individual wherever he may be, and *real* statutes, which have property as their principal object, and which apply only within the territory in which they are promulgated. Examples of personal statutes are those relating to birth, legitimacy, capacity in contract, and capacity to make a will. Examples of real

¹ See further, Keeton, *op. cit.* chap. ii.

statutes are those relating to the disposition of property, either *inter vivos* or by will. To Bartolus also is due a famous distinction, long since exploded by civilians. After noticing that primogeniture applies to real property in England he says that if the statute declares *Bona decedentis ut veniunt in primogenitum* (the intestate's estate shall descend to the eldest son), the statute is *real*, but if it says, *Primogenitus succedat* (the eldest son shall succeed to the estate), it is *personal*.

Bartolus not only distinguished between real and personal statutes (and although the basis of his distinction was rejected, the distinction itself survived for over three centuries), he also laid down certain principles for the application of differing systems of law. The procedure in every court, he declares, is that of the court having jurisdiction; whilst in the matter of contracts, it is necessary to distinguish carefully between the law governing the capacity of the parties, the law governing the formalities attending it, the law governing its execution, and the law governing the consequences of the contractual relations. Each of these laws is the appropriate local law.

To the real and personal statutes of Bartolus, D'Argentré, a Breton judge of the latter part of the sixteenth century, added a third class, the mixed statutes, involving both persons and property. Although this tripartite division did not escape criticism (for Merlin points out that there is "scarcely any law relative to persons which does not at the same time relate to things"), it remained the basis of classification until the end of the eighteenth century, although, as Story observes, "what particular statutes are to be deemed personal, and what real; when they may be said principally to regard persons, and when principally to regard things; these have been vexed questions, upon which much subtlety of discussion and much heat of controversy have been displayed."¹

The division of statutes into real, personal, and mixed has been vigorously attacked by Mr. Frederick Harrison, who points out that the conception of some laws as affecting persons, and others as affecting things is totally unscientific from the standpoint of Analytical Jurisprudence. Although, as Savigny points out, there are a few laws which may be asserted with some confidence to be personal, and others which are real, the vast majority include both elements, and writers completely fail to agree on which side of the dividing lines many of them ought to be placed.²

The distinction between real and personal statutes has become mere legal pedantry through other than legal considerations,

¹ *Conflict of Laws*, chap. i. para. 14.

² *Jurisprudence and the Conflict of Laws*, pp. 112-4.

however. The Middle Ages, as we have seen, was familiar with the idea of a law that moved with the individual subject to it. This was a legacy of the break-up of the Roman Empire, but it had become increasingly important through the existence of feudalism and feudal jurisdictions, and lastly, of the Law Merchant, administered by mercantile courts in every important seaport of Europe. The Renaissance and the Reformation, however, while giving birth to modern international law, at the same time modified the very basis of the Conflict of Laws. The rulers of the new nation-states acknowledged no limitations to their authority; within their territories, their will was supreme. In support of their claims, Bodin evolved the modern doctrine of state-sovereignty, and Grotius emphasised their equality in international law. At this point in European history, therefore, law ceases to be predominantly personal, and becomes territorial. The change does not occur all at once, and the process is not entirely completed until the French Revolution—but the change of attitude occurs at the end of the sixteenth century. This was the change which confronted the Dutch school of writers upon the Conflict of Laws in the seventeenth century, and they failed to solve the problem created by it, although they were fully aware of it. They could hardly be blamed, however. Writers in general had not yet become sufficiently familiar with the modern doctrines of state-sovereignty and equality, and the territorial operation of law to permit the old assumptions to be finally discarded. Perhaps the greatest of the Dutch school was Ulrich Huber whose *De Conflictu Legum* was published in 1686. Huber lays down three cardinal propositions: (1) The laws of every state operate only within the limits of its own territory, and bind all the subjects of that state; (2) all persons within the jurisdiction of the state, whether permanently or temporarily, are subjects, and are therefore regulated by the laws of that state; (3) from comity, the rulers of every state ought to permit the laws of other states to apply to the subjects of those other states within the territorial limits of a state, in so far as they do not prejudice the rights of the Government, or of the citizens of that state, adding at the same time: "From this it appears, that this matter is to be determined, not simply by the civil laws, but by the convenience and that consent of different people; for since the laws of one people cannot have any direct force among another people, so nothing could be more inconvenient in the commerce and general intercourse of nations than that what is valid by the laws of one place should become without effect by the diversity of laws of another."¹ The new doctrine did not escape criticism,

¹ Story, chap. ii. para. 29.

however. Hertius in his *De Collisione Legum*, published in 1688, reaffirms the old theory of real and personal statutes, declaring that comity is an insufficient foundation for the science.

The French school of lawyers, who followed the Dutch in the first half of the eighteenth century, and of whom Boullenois is the most important, added little to the achievements of their predecessors, but whilst they still retained the old theory of real and personal statutes (and in the case of Boullenois invented new subdivisions of these classes), they nevertheless recognised clearly the cardinal principles laid down by Huber, that a sovereign's power to make laws for those within his territories is absolute, but that with regard to those who are foreigners, international comity directs the application by him of foreign rules of law to certain classes of questions affecting them. This, then, is the starting point of the modern Conflict of Laws.

The second principle underlying the Conflict of Laws is simply another aspect of the first. If the authority of a sovereign to make laws for those within his territory is absolute, it follows that the sovereign of no other state has power to make laws for persons beyond the limits of his authority, or to apply existing laws to them. In other words, no state can, by its laws, regulate property in territory other than its own, nor regulate persons not resident within its jurisdiction. It is important to notice that this proposition applies only to states within the sphere of international law. The laws of a state frequently have extra-territorial operation upon the high seas, and in territories and backward countries in which the local jurisdiction cannot be recognised by a civilised state. From this it follows that the modern Conflict of Laws presupposes an international law which is binding upon civilised states.

It must also be noticed that the rule just enunciated is subject to an apparent exception. So long as the tie of allegiance subsists between a state and its subjects, it is said that the state may make laws which will be binding on its subjects, wherever they may be. But it must be observed that while the subjects of that state are within the territory of a second state, the laws of the first state will only operate upon its subjects within the limits permitted by the second state, and may even be excluded altogether, if the second state so decides. The first state, however, will require obedience to those laws when its subjects return within its own territory, but "whatever may be the intrinsic or obligatory force of such laws upon such persons, if they should return to their native country, they can have none in the other nations wherein they reside."¹

¹ Story, chap. ii. para. 22.

The third fundamental principle of the Conflict of Laws, which may be derived from the first two, opens up the whole question of its legal basis. The proposition says that whatever obligatory force the laws of one state have in the territory of another is derived exclusively from the municipal regulations of that other. This is an inevitable consequence of the fact that no state may make laws which are operative in the territory of another, and from it proceeds the further point that a state, if it wishes, may exclude completely all foreign laws from its own territory, and may insist that on every single occasion its own domestic regulations shall prevail. The growth of international intercourse, however, has made the maintenance of such an attitude by any state impossible, and in practice, all states do admit foreign laws to operate in certain classes of transactions.

The cardinal difficulty, however, is to discover what rules, if any, will determine what foreign laws shall be applied by a state. It is clear that the domestic laws of some states may be entirely unsuitable for application by another state within its own territories. Thus, as Story points out, no Christian state would care to give effect, no matter to how limited a degree, to laws upholding polygamy or incest. Again, the laws of some states may be diametrically opposed to the social or political well-being of another state. Here, again, application of them could scarcely be expected.

Certain continental jurists, faced with this difficulty, have attempted to lay down general principles of universal validity to govern the application of foreign laws, but there has been no agreement among them with regard to the nature of those principles, and as Mr. Justice Porter put it in *Saul v. His Creditors*:¹ "When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not for want of ability, but because the matter was not susceptible of being settled on certain principles." Actually, the application of foreign laws by a state depends simply upon international comity, and each state, recognising clearly that for the promotion of international intercourse it ought so to frame its legal system that it does not become an instrument of injustice to other states, must decide for itself what application of foreign laws will promote this end.

It has been asserted by some continental writers that international comity is too insecure a foundation for the science, and they have advanced the view that it rests upon a paramount moral duty, inherent in the state. Story points out, however, that even if such a moral duty did exist, it would necessarily be one of imperfect obligation, and each state would still be the sole judge

¹ 17 Martin 569. Story, chap. ii. para. 28.

of its nature, extent, and conditions of exercise. Other writers have gone further than this, and have endeavoured to show that the Conflict of Laws either is, or is becoming, a uniform system throughout the civilised world, and applicable in municipal tribunals in priority even to the law of the state concerned. On this view, Mr. Frederick Harrison comments: "Englishmen, whose ideas of law are based on the theory of sovereignty which we derive from Hobbes, Bentham, and Austin, whose notions of jurisprudence are drawn from practical decisions, not from dogmatic theories, are not likely to be very sanguine about the prospects of a Jurisprudence that professes to be independent of all positive legislation, paramount to the decisions of all tribunals, indifferent to local practice and habit, and almost superior to public convenience."¹

As a matter of fact, the tribunals of no state admit such a possibility. They decide whether the case before them is one in which the rules of some foreign system ought to be applicable to some or all of the facts, and if they decide in the affirmative, then they permit their own law to be superseded by that foreign law to the extent agreed upon. No superior system of principles dictate to them, however, how that decision shall be reached. Public International Law certainly does not. It requires that a state shall not ignore the rights of foreigners within its jurisdiction, as it might well do if it refused to take any account whatever of foreign systems, but it does not attempt to lay down rules. On this point, Mr. W. E. Beckett writes: "The central and essential part of the whole system is the choice of law. Is there record of a single diplomatic protest or international incident based on the failure to observe a principle of Private International Law concerning the choice of law? In the last century a case came before the English courts in which it was proved that the courts of Louisiana had given a judgment respecting property on a ship in which the rights of a mortgagee, duly acquired in accordance with all the formalities of English law, were ignored. The English courts refused to recognise this judgment, and in effect reversed it. Neither Great Britain nor the United States are, as a rule, slow to protest against violations of the Law of Nations with respect to their nationals. Yet there is no report of any protest on either side. . . . It seems, indeed, possible only to draw one conclusion—That there is no system of Private International Law, as a whole, recognised as binding by the law of nations."²

¹ *Jurisprudence and the Conflict of Laws*, p. 124.

² "What is Private International Law?" *British Year-Book of International Law*, 1926, pp. 84-5

The Conflict of Laws is thus not a part of international law. It is difficult, indeed, to see how the view could ever have been held. The only persons in international law are states, and disputes are settled in international courts, by diplomatic negotiation, or by war. In the Conflict of Laws, on the other hand, the persons are the ordinary legal persons of municipal law, and disputes are always settled in the courts of a state. The Conflict of Laws is, in fact, a part of the municipal law of each civilised state, and thus varies slightly from state to state. As Lord Stowell put it in *Dalrymple v. Dalrymple*, in considering the validity of a Scotch marriage: "Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of the marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland."¹

From this it is clear that the law of England is sufficiently wide to include rules stating on what occasions foreign laws will be applied in English courts. These rules constitute what, according to English views, is the Conflict of Laws. Similarly French law includes similar rules, which, in the view of French writers, also constitute the Conflict of Laws. So that in each civilised state there is a special department of the municipal law which may be termed the Conflict of Laws.

There remains only for consideration the question of the true scope of the Conflict of Laws. Practically all writers are agreed that it properly includes rules governing the determination of the state having jurisdiction in respect of a particular set of facts; and secondly, the rules governing the selection of the law to be applied. These are, actually, the only topics with which the Conflict of Laws is properly concerned. In practice, however, text-books include a number of other topics, *e.g.* nationality laws, the status of aliens, extraterritoriality, and criminal law. The inclusion of each of these is open to objection. As far as nationality is concerned, some writers lay down several principles which ought to govern nationality laws in general. These principles are not followed by states, and if they were, they would form part of international law. Other writers include the nationality law of the state under consideration. Logically, however, the law of nationality is part of constitutional law, not a rule of Private International Law, and if it is urged that the tribunals of a state

¹ 2 Hagg Consist. 59 (cited Story, chap. ii. para. 37).

must consider questions of nationality, it is clear that they must consider the nationality laws of all states, and not their own alone.¹

Similarly, the status of aliens is properly a branch of constitutional law. Moreover, it has nothing to do with the selection of jurisdiction, or the choice of law. Again, questions relating to the extraterritoriality enjoyed by foreign sovereigns, ambassadors, and public ships belong to the law of capacity in each particular system of municipal law. In so far as these privileges have an international aspect, they are within the province of international law.

Finally, there is the question of criminal law. No state applies the criminal law of another, and the only question which can therefore possibly arise is with regard to jurisdiction. It has been argued by some writers (and notably by von Bar and de Bustamente) that the rules of this topic are properly a part of the Conflict of Laws. The question of criminal jurisdiction, however, may be regarded from two points of view. In so far as the rules include those principles limiting a state's jurisdiction over aliens, and regarded as binding by the states themselves, the topic is a branch of international law. On the other hand, those rules in virtue of which a court's criminal jurisdiction is limited in cases where more than one nationality is involved are clearly questions of selection of jurisdiction, and would, therefore, seem to be properly included within the sphere of the Conflict of Laws. Continental writers, however, frequently assign such questions to a different department of law altogether, *Droit International Pénal*, on which a considerable literature already exists abroad.²

It has been noticed earlier that the view held by some continental writers that a system of Conflict of Laws of universal validity could be deduced from a few *a priori* general principles is fallacious, and that each state has its own developing system. These divergences cannot fail to inflict hardships in some cases, and in consequence the present century has witnessed a steady movement towards a common system of rules regulating the Conflict of Laws, acceptable to the tribunals of all states, and a draft code has even been prepared. It is not impossible, therefore, that such an adoption of a common code may take place in the future. While national systems in other respects will continue to exhibit the same differences as heretofore, one department will have been standardised. It is important to notice, however, that even then its basis will remain unaltered. The rules of the code

¹ Beckett, *op. cit.* pp. 86-7.

² See further, Beckett, *op. cit.* pp. 93-4.

will receive no special authority through the fact that they are drafted by an international commission of experts. They will derive their binding force from the fact of their acceptance by the states concerned, and their subsequent application in the courts of those states.

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